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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, Appellant,

vs.

DEAN RUSK, SECRETARY OF STATE, ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

FILED MAY 15, 1964

JURISDICTION POSTPONED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

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INDEX

Original Print

Record from the United States District Court for the District of Connecticut		
Amended complaint for declaratory judgment and injunction	9	1
Answer to amended complaint	21	7
Amendment to answer to amended complaint	26	10
Request for a three-judge court	30	11
Motion for summary judgment by plaintiff	32	12
Affidavit of Louis Zemel	34	13
Designation of judges	36	14
Defendants' motion for summary judgment	37	15
Defendants' statement of material facts	38	16
Affidavit of Miss Frances G. Knight	40	17
Attachment—Public Notice 179 (F.R. Doc. 61-505 filed January 18, 1961) and Department of State Regulation 108.456 (F.R. Doc. 61-506 filed January 18, 1961) which appeared in the January 19, 1961 issue of the Federal Register	43	20
Attachment—Department of State Press Release No. 24 of January 16, 1961	44	22

Record from the United States District Court for
the District of Connecticut—Continued

Defendants' motion for summary judgment—
Continued

Affidavit of Miss Frances G. Knight—Con-
tinued

Attachment—Letter from Louis Zemel to
Miss Frances G. Knight, Director, Pass-
port Office, dated March 31, 1962

45 23

Attachment—Letter from Edward J. Hickey,
Acting Director, Passport Office to Mr.
Louis Zemel, dated April 18, 1962

46 23

Attachment—Letter from Louis Zemel to
Miss Frances G. Knight, Director, Pass-
port Office, dated May 1, 1962

47 24

Attachment—Letter from Robert D. John-
son, Acting Deputy Director, Passport
Office to Mr. Louis Zemel, dated May 9,
1962

48 25

Attachment—Letter from Mr. Louis Zemel
to Robert D. Johnson, Acting Deputy Di-
rector, Passport Office, dated May 21, 1962

50 26

Attachment—Letter from Robert D. John-
son, Acting Deputy Director, Passport Of-
fice to Mr. Louis Zemel, dated June 4, 1962

51 27

Attachment—Letter from Leonard B. Bou-
din to Miss Frances G. Knight, Director,
Passport Office, dated October 9, 1962

52 28

Attachment—Letter from Edward J. Hickey,
Deputy Director, Passport Office to Mr.
Leonard Boudin, dated October 17, 1962

53 29

Attachment—Letter from Louis Zemel to
Mr. Edward J. Hickey, Deputy Director,
Passport Office, dated October 30, 1962

54 30

Attachment—Letter from Edward J. Hickey,
Deputy Director, Passport Office to Mr.
Louis Zemel, dated November 5, 1962

55 31

Memorandum of decision on cross motions for
summary judgment

59 32

Opinion concurring in part, dissenting in part,
Smith, J.

83 52

Record from the United States District Court for
the District of Connecticut—Continued
Opinion concurring in part, dissenting in part,

Original Print

Blumenfeld, J. _____	89	57
Judgment _____	103	67
Notice of appeal _____	105	68
Clerk's certificate (omitted in printing) _____	109	69
Order postponing jurisdiction _____	110	70

[fol. 9]

File endorsement omitted]

1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

Civil Action No. 9549

LOUIS ZEMEL, Powder Hill Road, Middlefield,
Connecticut, Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State,
Washington, D.C. and ROBERT F. KENNEDY, Attorney
General, Washington, D.C., Defendants.

**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTION—Filed April 20, 1963**

The plaintiff, Louis Zemel, by his attorneys, complaining of the defendants, Dean Rusk, Secretary of State, and Robert F. Kennedy, Attorney General, alleges as follows:

1. The Court has jurisdiction of this action under Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009; and under Title 28 U.S.C. Sections 1391 and 2201. One of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U.S.C. Sections 2282 and 2284.

2. Plaintiff is a citizen of the United States, residing in Middlefield, Connecticut.

[fol. 10] 3. The defendant, Dean Rusk, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

4. The defendant, Robert F. Kennedy, is Attorney General of the United States and is charged by law with the duty of regulating departure from and entry into the United States.

5. Plaintiff is the holder of a valid United States passport of standard form and duration.

6. On January 16, 1961, the defendant Secretary of State announced publicly and formally ruled that United States passports are invalid for travel to Cuba unless such passports are specifically endorsed by him for such travel. The said announcement was made in Press Release No. 24 of the Department of State.

7. On January 16, 1961, the defendant Secretary of State, through his Deputy Under-Secretary for Administration, issued Public Notice 179, 26 F.R. 492 (January 19, 1961), which stated that "all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba" and "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked."

8. On January 16, 1961, the defendant Secretary of State issued Departmental Regulation 108.456, which was published on January 19, 1961 (26 F.R. 482-483), which amended 22 CFR 53.3(b), and which exempted Cuba from those countries in the Western Hemisphere for which a passport is not required of United States citizens by the defendant Secretary of State.

9. The said restrictions upon travel to Cuba are purportedly based upon the President's powers under (i) Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, (ii) the Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a, (iii) Sections 124 and 126 of Executive Order 7856, 3 F.R. 681, 687, 22 CFR 51.75, 51.77, and (iv) Proclamation 3004, 18 F.R. 489 issued on January 17, 1953, the said Proclamation being based upon the alleged existence of a national emergency arising principally from the Korean War. In addition, the defendant Secretary of State has claimed the existence of an "inherent executive power" to restrict and prevent such travel.

10. Upon information and belief, the defendant Secretary of State has publicly announced and privately advised individuals that criminal proceedings against United States citizens traveling to Cuba and not possessing the said endorsements in their passports would be instituted. In at least one such case, the defendant Attorney General recently instituted a criminal prosecution against an American citizen on the ground that his entry into the United States from Cuba without a passport validated as set forth [fol. 12] above constitutes a violation of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185.

11. Upon information and belief, the restrictions and sanctions set forth in paragraphs "9" and "10" above have caused common carriers to refuse to carry United States citizens not bearing United States passports with the special endorsement referred to in paragraph "7" above, and have caused foreign governments to refuse to permit the departure of American citizens from their territories for Cuba under similar circumstances.

12. On March 31, 1962 and thereafter, the plaintiff requested the defendant Secretary of State to validate his passport for travel to Cuba. Such requests were rejected by defendant on April 18, 1962 and thereafter.

13. On May 1, 1962, the plaintiff requested that the defendant Secretary of State give him a hearing in connection with the said defendant's refusal to validate plaintiff's passport for travel to Cuba. On May 9, 1962, the said defendant, citing 22 CFR 51.170 advised the plaintiff that the State Department's hearing procedures were not available in cases of this kind.

14. The actions of the defendants in this case are unlawful in that:

(a) The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, does not authorize the defendants to prevent by denial of passport facilities or by threat of civil or criminal sanctions or otherwise, the travel of an American citizen [fol. 13] to or in any part of the world.

4

(b) Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, does not authorize the defendants to prohibit the travel of United States citizens to or in countries specified by the said defendants or make illegal the departure from the United States to any country whatsoever of American citizens bearing valid passports.

(c) The denial of the right to travel is an interference with plaintiff's right as a citizen and resident of the United States to freedom of speech, belief and association under the First Amendment to the Constitution of the United States, and his right to travel under the Fifth, Ninth and Tenth Amendments, and is so arbitrary and unreasonable as to deny plaintiff due process under the Fifth Amendment.

(d) The Korean War which was the basis for Proclamation 3004 of January 17, 1953 terminated more than eight years ago. The said Proclamation is accordingly inoperative as a matter of law, and there is in fact no emergency existing at the present time which could rationally justify the exercise of controls by the defendants over the travel of American citizens to and from the Republic of Cuba.

15. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth [fol. 14] in paragraph 14(c); and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power.

16. The defendant Secretary of State's regulations and announcements as set forth in paragraphs "6" through "8" above are invalid for the additional reason that Executive Order 7856 and Proclamation 3004 fail to contain any standards to guide the Secretary of State in promulgating the said regulations and to guide the American citizen in determining whether the regulations are supported by statute or proclamation.

17. The plaintiff has exhausted his administrative remedies.

18. The actions of the defendants in denying the plaintiff the passport facilities sought, in obstructing plaintiff's departure from the United States to Cuba, in interfering with his travel, and in threatening the imposition of criminal and civil proceedings are causing plaintiff irreparable injury for which he has no adequate remedy at law.

Wherefore, plaintiff prays for a judgment,

(a) Decreeing that plaintiff is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose;

[fol. 15] (b) Decreeing that plaintiff's travel to Cuba and his use of the passport for that purpose will not constitute a violation of the passport laws of the United States, or of the Immigration and Nationality Act of 1952, or of the State Department's rules and regulations, or of the terms and conditions of his passport;

(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F.R. 492, and in Departmental Regulation 108.456, 26 F.R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, or by Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, or by Proclamation 3004, 18 F.R. 489;

(d) Decreeing that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid;

(e) Decreeing that the defendant Secretary of State's refusal to afford passport facilities to plaintiff so that he may go to Cuba is in violation of plaintiff's rights under the statutes and Constitution of the United States and the Declaration of Human Rights of the United Nations;

(f) Decreeing that the denial of the said passport endorsement and validation to plaintiff without a formal hearing at which evidence is adduced to show how the national security would be affected adversely by plaintiff's [fol. 16] proposed trip to Cuba, violates plaintiff's rights to due process under the Fifth Amendment to the Constitution;

(g) Directing the defendant Secretary of State to validate plaintiff's passport for travel to and from Cuba;

(h) Enjoining the defendants from interfering with plaintiff's travel to Cuba, and from taking any adverse action whatsoever against plaintiff by way of passport cancellation, denial of future passport facilities, institution of criminal proceedings, advice or instructions to other governments and to common carriers, or other actions against the plaintiff by reason of his prospective travel to Cuba and such travel when consummated;

(i) And for such other and further relief as may be just and proper.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

Gruber & Turkel, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Conn.

Attorneys for Plaintiff.

So Ordered:

Robert J. Anderson, J., United States District Court.

Certificate of service (omitted in printing).

[fol. 21] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed May 6, 1963

Now come the defendants, by their attorneys, in answer to the amended complaint herein filed, and say:

First Defense

1. The defendants deny the allegations contained in Paragraph 1 of the amended complaint.

2. The defendants admit the allegations contained in Paragraph 2 of the amended complaint.

3. Answering Paragraph 3 of the amended complaint, the defendant Dean Rusk admits that he is the Secretary of State of the United States and that he has the authority to grant and issue United States passports. This defendant denies the other allegations contained in Paragraph 3 of the amended complaint.

4. The defendants deny the allegations contained in Paragraph 4 of the amended complaint.

5. The defendant Secretary of State admits the allegations contained in Paragraph 5 of the amended complaint.

[fol. 22] 6. Answering Paragraph 6 of the amended complaint, the defendant Secretary of State admits that on January 16, 1961, he issued Press Release No. 24, which stated that travel to Cuba by American citizens was forbidden unless their passports were specifically endorsed or validated for such travel.

7-8. The defendant Secretary of State admits the allegations contained in Paragraphs 7 and 8, inclusive of the amended complaint.

9. Answering Paragraph 9 of the amended complaint, the defendant Secretary of State denies that the sources of his authority to place restrictions on travel by United States citizens to Cuba are limited to the particular statutes, proclamation, and executive order enumerated by the plaintiff, and further alleges that he also derives his authority aforesaid from the inherent power of the executive over foreign affairs.

10. Answering Paragraph 10 of the amended complaint, the defendant Secretary of State admits that the Department of State press releases have advised all concerned that travel to Cuba by a United States citizen without a passport specifically validated by the Department of State for that purpose constitutes a violation of the Travel Control Law and Regulations, a willful violation of which is punishable by fine and/or imprisonment. Further answering said paragraph, the defendant Attorney General of the United States admits that the United States Government [fol. 23] recently instituted criminal proceedings against one William Worthy, Jr., on the ground that he "did unlawfully, wilfully and knowingly enter the United States without bearing a valid passport, the said [William Worthy, Jr.] then and there having arrived from the Republic of Cuba, a place outside the United States for which a valid passport is required under 22 CFR 53.2 and 53.3. In violation of Section 1185(b), Title 8, United States Code." The defendant Secretary of State denies the other allegations contained in this paragraph.

11. The defendants deny the allegations contained in Paragraph 11 of the amended complaint.

12-13. The defendant Secretary of State admits the allegations contained in Paragraphs 12 and 13 of the amended complaint.

14-16. The defendants deny the allegations contained in Paragraphs 14 through 16, inclusive, of the amended complaint.

17. The defendants admit the allegations contained in Paragraph 17 of the amended complaint.

18. The defendants deny the allegations contained in Paragraph 18 of the amended complaint.

Second Defense

The amended complaint fails to state a claim upon which relief may be granted.

Third Defense

The court lacks jurisdiction over the subject matter of the amended complaint.

[fol. 24]

Fourth Defense

Plaintiff, not coming within the exceptions contained in the announced policy of the Department of State with respect to travel to Cuba, is not eligible to have his passport validated for travel to Cuba, a country with which the United States does not maintain diplomatic relations.

Fifth Defense

The action of the defendant complained of is necessary to the conduct of foreign relations of the United States, is in compliance with the Constitution, applicable statutes, executive orders, proclamations, and regulations, and is not arbitrary, capricious, or an abuse of discretion.

Sixth Defense

The conduct and exercise of the foreign relations of the United States resides in the Executive Branch of the Government. Within the reasonable and proper exercise of foreign relations, the Executive may properly prevent travel by United States citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations.

Seventh Defense

There is no legal basis or justification for the Court to enjoin the defendants from instituting criminal proceedings against the plaintiff should he commit a violation of law.

[fol. 25] Wherefore, the defendants, having fully answered the allegations contained in the numbered paragraphs of the amended complaint, pray that the amended complaint herein be dismissed, with costs taxed against the plaintiff.

Robert C. Zampano, United States Attorney;
F. Kirk Maddrix, Attorney, Department of Justice;
Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys for Defendants.

Certificate of service (omitted in printing).

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

[Title omitted]

AMENDMENT TO ANSWER TO AMENDED COMPLAINT—
Filed May 10, 1963

The defendants, by their attorneys, hereby amend Paragraph 4 of their answer to the amended complaint to read as follows:

"4. Answering Paragraph 4 of the amended complaint, the defendants admit that Robert F. Kennedy is the Attorney General of the United States and deny the other allegations contained therein."

Robert C. Zampano, United States Attorney;
F. Kirk Maddrix, Attorney, Department of Justice;
Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys for Defendants.

[fol. 27] Certificate of service (omitted in printing).

[fol. 29]

[File endorsement omitted]

[fol. 30]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

REQUEST FOR A THREE-JUDGE COURT—Filed July 12, 1963

Comes now the plaintiff in the above-entitled case and upon the amended complaint herein, the answer thereto, the amended answer, plaintiff's motion for summary judgment and plaintiff's supporting affidavit sworn to April 15, 1963, suggests to the Court the necessity for convening a three-judge court in conformity with 28 U.S. Code, Sections 2282 and 2284 for the reason that plaintiff seeks to restrain the enforcement and execution of two Acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S. Code, Sections 211-a and 215, and the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S. Code, Section 1185, for repugnance to the Constitution of the [fol. 31] United States.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York.

Gruber & Turkel, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Connecticut.

[fol. 32]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF—
Filed July 12, 1963

Now comes the plaintiff by his attorneys and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

In support of this motion, plaintiff refers to the record herein including the amended complaint, the answer thereto, the defendants' amendment to the answer, and plaintiff's annexed affidavit sworn to the 15th day of April, 1963.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

[fol. 33]

Gruber & Turkei, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Conn.;

Attorneys for Plaintiff.

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549
[Title omitted]

AFFIDAVIT OF LOUIS ZEMEL—April 15, 1963

Louis Zemel, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action. I make this affidavit in support of my motion for summary judgment in the said action.
2. I have read the amended complaint filed in this action and I know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.
3. I have been in correspondence with the Department of State in connection with my desire to travel to Cuba. The most significant of such correspondence is attached hereto as Exhibits through
4. I desire to travel to Cuba for the purposes indicated [fol. 35] in this correspondence. I believe that I am entitled under the Constitution of the United States to make such a trip.
5. Upon the amended complaint, this affidavit and the proceedings heretofore had herein, I respectfully ask that this Court enter a summary judgment in my favor for the relief prayed for in the complaint.

Louis Zemel

Sworn to before me this 15th day of April, 1963.

Sophie Edwin, Notary Public, State of New York, No.
24-6153600, Qualified in Kings County, Commission
Expires March 30, 1964.

* CLERK'S NOTE—The correspondence referred to is that attached to the affidavit of Miss Frances G. Knight printed on pages 20-31, *infra*.

[for 36]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

LOUIS ZEMEL, Powder Hill Road, Middlefield, Connecticut,
Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State,
Washington, D. C., Defendant.

DESIGNATION OF JUDGES—Filed September 13, 1963

Having been notified by the Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut, that an application has been filed in the above matter for relief pursuant to Title 5 United States Code Section 1009 and Title 28 United States Code Sections 1361 and 2201 for an order enjoining the enforcement and execution of certain acts of Congress for repugnance to the Constitution, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable M. Joseph Blumenfeld, to hear and determine said cause as provided by law: Honorable J. Joseph Smith, United States Circuit Judge and Honorable T. Emmet Clarie, United States District Judge for the District of Connecticut.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States
Court of Appeals for the Second Circuit.

Dated: New York, N. Y., September 11, 1963.

[fol. 37]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

[Title omitted]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—
Filed November 13, 1963

Come now the defendants, the Secretary of State of the United States and the Attorney General of the United States, by their attorneys, and respectfully move this Honorable Court for summary judgment pursuant to the provisions of Rule 56, F.R. Civ. P., on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

In support of this motion the Court's attention is respectfully invited to the defendants' memorandum of points and authorities and to the affidavit of Knight, both attached hereto. A separate statement of material facts is also attached.

Robert C. Zampano, United States Attorney;
Benjamin C. Flannagan, Attorney, Department of
Justice, Washington, D.C., Attorneys for De-
fendants.

[fol. 38]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

**DEFENDANTS' STATEMENT OF MATERIAL FACTS—
Filed November 13, 1963**

The defendants respectfully assert that there is no genuine issue as to the following material facts:

1. There currently exists in this country a national emergency proclaimed by the President. Proclamation 3004, 67 Stat. C31.

2. A passport is now required of United States citizens for travel to Cuba. 8 U.S.C. 1185 and 22 C.F.R. 53.3.

3. United States passports are currently not valid for travel to Cuba unless specifically validated for such travel. They are validated only for persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests. Public Notice 179, 26 F.R. 492; Press Release No. 24, dated January 16, 1961.

4. Plaintiff, the holder of a passport, applied for validation thereof for travel to Cuba on March 31, 1962 on the ground that he "should like very much to visit Cuba this summer as a tourist." Affidavit of Knight.

[fol. 39] 5. On April 18, 1962 plaintiff's application was denied on the ground that tourist travel to Cuba is not regarded as travel which would be in the best interests of the United States and that his letter of March 31, 1962 did "not present evidence of a compelling nature that would justify the validation of a passport for travel to Cuba at this time." Affidavit of Knight.

6. On May 1, 1962 plaintiff requested a hearing on the denial of his application for validation and this request was denied on May 9, 1962. Affidavit of Knight.

7. Plaintiff filed this action on December 7, 1962.

Robert C. Zampano, United States Attorney; Benjamin C. Flannagan, Attorney, Department of Justice, Washington, D.C., Attorneys for Defendants.

[fol. 40]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

AFFIDAVIT—Filed November 18, 1963

City of Washington,
District of Columbia, ss:

Frances G. Knight, being duly sworn, deposes and says:

1. That on May 1, 1955, she was duly appointed the Director of the Passport Office of the Department of State; that she has continued to serve as the Director since that time, and that she has personal knowledge of the matters related in this affidavit;

2. That the attached copies of Public Notice 179 (F. R. Doc. 61-505 filed January 18, 1961) and Department of State Regulation 108.456 (F. R. Doc. 61-506 filed January 18, 1961) are true copies of the originals which appeared in the January 19, 1961 issue of the Federal Register;

3. That the attached copy of Department of State Press Release No. 24 of January 16, 1961 is a true copy of the original which was released on that date;

[fol. 41] 4. That she is the legal custodian of all official records of the Passport Office of the Department of State;

5. That the attached copies of correspondence, identified below, relating to Louis Zemel are true copies of the originals contained in the official records of the Passport Office, Department of State:

(a) Letter of March 31, 1962 to Miss Frances G. Knight, Director, Passport Office from Louis Zemel.

(b) Letter of April 18, 1962 to Mr. Louis Zemel from Edward J. Hickey, Acting Director, Passport Office.

(c) Letter of May 1, 1962 to Miss Frances G. Knight, Director, Passport Office from Louis Zemel.

(d) Letter of May 9, 1962 to Mr. Louis Zemel from Robert D. Johnson, Acting Deputy Director, Passport Office.

(e) Letter of May 21, 1962 to Robert D. Johnson, Esquire, Acting Deputy Director, Passport Office from Louis Zemel.

(f) Letter of June 4, 1962 to Mr. Louis Zemel from Robert D. Johnson, Acting Deputy Director, Passport Office.

(g) Letter of October 9, 1962 to Miss Frances G. Knight, Director, Passport Office from Leonard B. Boudin, Attorney At Law.

(h) Letter of October 17, 1962 to Mr. Leonard B. Boudin, Attorney At Law from Edward J. Hickey, Deputy Director, Passport Office.

(i) Letter of October 30, 1962 to Mr. Edward J. Hickey, Deputy Director, Passport Office from Louis Zemel.

[fol. 42] (j) Letter of November 5, 1962 to Mr. Louis Zemel from Edward J. Hickey, Deputy Director, Passport Office.

6. That since April 1, 1963, all passports issued by the Department of State have contained the following restrictions:

This Passport is not valid for travel to or in Communist controlled portions of

China
Korea
Viet-Nam

Or to or in

Albania
Cuba

A person who travels to or in the listed countries or areas may be liable for prosecution under Section 1185, Title 8, United States Code, and Section 1544, Title 18, United States Code.

Frances G. Knight

Sworn to before me this 12 day of November, 1963.

(Seal)

Elizabeth F. McCormack, Notary Public. My Commission expires September 30, 1965.

[fol. 43]

ATTACHMENT TO AFFIDAVIT

FEDERAL REGISTER

January 19, 1961

[Dept. Reg. 108.456]

PART 53—TRAVEL CONTROL OF CITIZENS AND NATIONALS IN
TIME OF WAR OR NATIONAL EMERGENCY

Exceptions to Regulations

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in § 53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§ 53.3 Exceptions to Regulations in 53.2.

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also*, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489.)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to

this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON,
*Deputy Under Secretary for
Administration.*

[F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.]

DEPARTMENT OF STATE

[Public Notice 179]

UNITED STATES CITIZENS

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961.

For the Secretary of State.

LOY HENDERSON,
*Deputy Under Secretary for
Administration.*

[F.R. Doc. 61-505; Filed, Jan. 18, 1961; 8:54 a.m.]

[fol. 44]

ATTACHMENT TO AFFIDAVIT
DEPARTMENT OF STATE
FOR THE PRESS

January 16, 1961

No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

State—RD, Wash., D. C.

[fol. 45] ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club,
Zemel Bros., Inc., Middlefield, Connecticut.)

March 31, 1962

Miss Frances G. Knight
Director, Passport Office
Department of State
Washington, D. C.

[Stamp—Passport office, Cor-3, Apr. 9, 1962, Correspondence and Review Staff]

[Handwritten notation—Ans by White, LP 4/9/62]

Dear Miss Knight:

I should like very much to visit Cuba this summer as a tourist. I understand that it is necessary to obtain special permission for this trip from the State Department. I presently hold passport Number 1256609 issued October 22nd, 1958 and renewed November 14th, 1960.

Would you be good enough to advise me as to the procedure to be followed to have my passport validated for travel to Cuba?

Sincerely yours,

/s/ LOUIS ZEMEL
Louis Zemel; Ig

[fol. 46] ATTACHMENT TO AFFIDAVIT

[Handwritten notation—PT/DA]

In reply refer to

Apr 18 1962

C130—Zemel, Louis

Dear Mr. Zemel:

I refer to your letter of March 31, 1962, requesting information regarding a validation for travel to Cuba.

You will see from the enclosed press release that passports are now required for travel to Cuba, and that they are only issued to persons whose travel may be in the best

interests of the United States, such as, newsmen and businessmen with previously established interests. Tourist travel is excluded.

Your letter does not present evidence of a compelling nature that would justify the validation of a passport for travel to Cuba at this time.

Sincerely,

J. McFubb

Enclosure:

Press Release.

Mr. Louis Zemel,

Powder Hill Cabana Club,

Powder Hill Road,

Middelfield, Connecticut.

Edward J. Hickey

Acting Director, Passport Office

[fol. 47]

ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club, Zemel Bros., Inc., Middlefield, Connecticut.)

May 1, 1962

[Handwritten notation—PT]

Miss Frances G. Knight

Director, Passport Office

Department of State

Washington, D. C.

Dear Miss Knight:

On March 31st I sent a letter, copy enclosed, asking for special permission to visit Cuba.

This request has been refused by the State Department.

I should like to request a hearing on this application in as much as I feel justified in wanting to make the trip.

Can you advise the date on which such a hearing can be scheduled?

Very truly yours,

Louis Zemel

/s/ LOUIS ZEMEL

LZ:I

[fol. 48]

ATTACHMENT TO AFFIDAVIT

In reply refer to
PT/LS 130—Zemel, Louis

May 9 1962

Dear Mr. Zemel:

We refer to your letter of May 1, 1962, requesting a hearing in the matter of the Department's refusal to validate your passport for travel to Cuba.

In our letter of April 18, 1962, you were advised that American citizens must have their passports specifically validated for travel to Cuba and that validations were granted only to persons whose travel was considered in the best interests of the United States, such as, newsmen and businessmen with previously established business interests. You were further advised that the reasons given by you for travel to Cuba did not meet these criteria.

The general restriction on the travel by American citizens to Cuba and individual action denying the validation of a passport for travel to Cuba are based upon foreign policy considerations and consequently do not raise any issues for determination by the administrative procedures established in the Department. Enclosed for your information is a copy of the Department's Regulations which outline the administrative procedures available in cases involving adverse passport action. You will note in Section 51.170 of these Regulations that actions taken by reason of geographical limitations of general applicability necessitated by foreign policy considerations are excepted from the review and appeal procedures.

The authority of the Chief Executive of the United States acting through the Secretary of State to promulgate general geographical restrictions on the travel of American

Mr. Louis Zemel,
Powder Hill Cabana Club,
Powder Hill Road,
Middlefield, Connecticut.

[fol. 49] citizens when foreign policy considerations so dictate was upheld in the case of *Worthy vs. Herter* 270 F 2d 905 decided in 1959 (certiorari denied by the Supreme Court). The authority to make exceptions to these general restrictions and to establish reasonable criteria for granting such exceptions was upheld in *Frank vs. Herter* 269 F 2d 245 and *Porter vs. Herter* 278 F 2d 280.

Although, under the circumstances set forth above, the Department's administrative procedures are not available to you, we would, of course, be happy to discuss the matter informally with you. If you wish us to schedule an interview for you, please let us know.

Sincerely,

/s/ R. D. J.

Robert D. Johnson
Acting Deputy Director
Passport Office

Enclosure:

Copy of Regulations

[fol. 50]

ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club, Zemel Bros., Inc., Middlefield, Connecticut.)

May 21, 1962

Robert D. Johnson, Esq.
Acting Deputy Director
Passport Office
Department of State
Washington 25, D. C.

Dear Mr. Johnson:

I thank you for your letter of May 9th.

I would appreciate your advising me as to the exceptions to the general restrictions on the travel of American Citizens to Cuba.

Would you be good enough to send me an actual copy of the regulations and rules spelling out those exceptions.

After reading them, I shall then be in a position to determine whether to accept your kind offer for an interview.

Sincerely yours,

/s/ LOUIS ZEMEL
Louis Zemel:ig

[Stamp—Passport office, May 22, 1962 PT/L RDJ]

[Stamp—Passport office, June 1, 1962 PT/LS]

[fol. 51]

ATTACHMENT TO AFFIDAVIT

In reply refer to

Jun 4 1962

PT/LS 130—Zemel, Louis

[Handwritten notation—6/21/62 File GB PT/LS]

Dear Mr. Zemel:

We refer to your letter of May 21, 1961, concerning your request for the validation of your passport for travel to Cuba.

The criteria for granting exceptions to the general restriction on travel to Cuba are basically those set forth in the second paragraph of our letter of May 9, 1962. However, a copy of the Department's Press Release of January 16, 1961, announcing the restriction is enclosed for your information.

Sincerely,

/s/ RDJ/CHS

Robert D. Johnson
Acting Deputy Director
Passport Office

Enclosure:

Copy of Press Release of
January 16, 1961

Mr. Louis Zemel,
Powder Hill Cabana Club,
Powder Hill Road,
Middlefield, Connecticut.

[fol. 52]

ATTACHMENT TO AFFIDAVIT

(Letterhead of Rabinowitz & Boudin, 30 East 42nd Street,
New York 17, N. Y.)

[Stamp—Passport office Oct 11 1962 PT/L]

[Handwritten notation—PT/LAD R. Johnson]

October 9, 1962

Miss Frances G. Knight,
Director, Passport Office
Passport Office, Department of State
Washington, D. C.

Att: Robert D. Johnson, Esq.,
Acting Deputy Director

Dear Miss Knight:

In prior correspondence with our client, Mr. Louis Zemel, your office declined to validate his passport for travel to Cuba and advised him that the Department's administrative procedures were not available for purposes of review.

Since Mr. Zemel has now received a new passport and still desires such validation, would you regard this as a renewed request for validation and for review. I assume that the response of the Department will be the same and I merely make this request so that in the event of ultimate litigation, no suggestion of mootness will be made.

I shall appreciate your reply.

Sincerely yours,

/s/ LEONARD B. BOUDIN
Leonard B. Boudin

LBB:se

[Stamp—Passport office Oct 15 1962 PT/LAD]

[fol. 53]

ATTACHMENT TO AFFIDAVIT

In reply refer to

Oct 17 1962

PT/LAD—130—Zemel, Louis

Dear Mr. Boudin:

We refer to your letter of October 9, 1962 requesting validation of Mr. Louis Zemel's passport for travel to Cuba.

We have reviewed Mr. Zemel's passport file and note that he applied for validation of his passport for travel to Cuba on March 31, 1962. His application was refused at the time because the reason he gave for his travel to Cuba did not come within established criteria.

In view of the time elapsed since Mr. Zemel's past application and the current reasons Mr. Zemel may have for travel, we suggest that he formally apply for validation of his passport for travel to Cuba. The application should be in writing and must contain the following information:

1. Purpose of trip.
2. Expected duration of stay in Cuba.
3. Address while in Cuba.
4. Assurance that he will register with the Consulate of Switzerland, Havana, upon arrival in that city.

Upon receipt of Mr. Zemel's application, prompt consideration will be given to his request for validation.

Sincerely,

/s/ EJH

Edward J. Hickey
Deputy Director, Passport Office

Mr. Leonard Boudin,
Attorney-at-Law,
30 East 42nd Street,
New York 17, New York.

[Handwritten notation—Copy given Mr. Hickey by FGK.
10-17-62]

[Stamp—Legal Division, cc Subject; cc
Tickler; cc ✓ Chron; cc]

[fol. 54]

ATTACHMENT TO AFFIDAVIT

October 30, 1962

Mr. Edward J. Hickey
Deputy Director, Passport Office
Department of State
Washington, D. C.

[Stamp—Passport office Nov 2 1962 PT/L]

Dear Mr. Hickey:

I am replying to your letter of October 17 to Mr. Boudin regarding validation of my passport for travel to Cuba.

Please consider this letter as a current application for such validation.

The purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen. I would expect to stay in Cuba for approximately two to three weeks. My address while in Cuba would be the Havana Libre Hotel. I am perfectly willing to register with the consulate of Switzerland in Havana upon arrival in that city.

I would appreciate a prompt consideration of this request.

Sincerely,

/s/ LOUIS ZEMEL
LZ:i

Louis Zemel
Pease Road
Woodbridge, Conn.

[Passport office—Nov 1 1962 PT/DA]

[fol. 55]

ATTACHMENT TO AFFIDAVIT

In reply refer to

Nov 5 1962

PT/L

[Handwritten notation—PD 11-5-62]

Dear Mr. Zemel:

Reference is made to your letter of October 30, 1962, questioning validation of your passport for travel to Cuba.

You state that the purpose of your travel is "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."

Our records show that you have been informed by letters dated April 18, 1962, May 9, 1962, and June 4, 1962, of the criteria, the regulatory and legal authority concerning the travel to Cuba by United States citizens. The criteria set out in the Department of State Press Release of January 16, 1961, a copy of which has been furnished to you are still in effect.

It is obvious that your present purpose of visiting Cuba does not meet the standards for validation of your passport.

Sincerely,

/s/ EJH

Edward J. Hickey

Deputy Director, Passport Office

Mr. Louis Zemel,
Pease Road,
Woodbridge, Connecticut.

cc: Mr. Leonard B. Boudin

[fol. 59]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State, and
ROBERT F. KENNEDY, Attorney General, Defendants.

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR
SUMMARY JUDGMENT—February 20, 1964

The plaintiff, a citizen of the United States and residing within this judicial district, has brought this action against Dean Rusk, Secretary of State of the United States and Robert F. Kennedy, the Attorney General of the United States for a declaratory judgment and to enjoin the enforcement and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185, both of which the plaintiff claims are repugnant to the Constitution. Jurisdiction of this Court is invoked under Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946). 5 U.S.C. § 1009 and 28 U.S.C. §§ 1391 and 2201; and pursuant to 28 U.S.C. §§ 2282 and 2284 a three-judge court was convened to pass upon the constitutional questions in issue.

Cross motions have been filed by the respective parties, pursuant to Rule 56, Fed. R. Civ. P., for the entry of summary judgment based on the representation of both parties [fol. 60] that there exists in this case no genuine issue as to any material fact. Having heard the arguments of counsel for the respective parties and having considered their amended pleadings, affidavits, briefs and other papers on

file, the Court is of the opinion that the plaintiff's motion for summary judgment should be denied and the defendants' motion for summary judgment should be granted.

The material facts are undisputed. On March 31, 1962, while the plaintiff was the holder of a valid United States passport of standard form and duration, he applied by letter to the Director of the Passport Office at Washington, D.C., for permission to have his passport validated for travel to Cuba as a tourist. The Passport Office denied him the permission requested, with the explanation that only persons whose travel might be in the best interests of the United States, such as newsmen and businessmen with previously established interests, could be eligible; and specifically that tourist travel was excluded. Thereafter, on May 1, 1962, the petitioner requested a hearing on his application without reciting any new reason, except that he felt justified in wanting to make the trip. He was sent a copy of the current Administrative Procedures of the Passport Office and advised by the acting Deputy Director, citing 22 C.F.R. 51.170 (1958), that in those instances where foreign travel was restricted by geographical limitations, which were generally applicable to everyone, no administrative procedures for review or appeal were provided. Subsequently, on October 11, 1962, the petitioner through his attorney advised the Passport Office by letter, that the former had acquired a new passport and renewed petitioner's request for its validation and a review of any denial. The [fol. 61] department advised counsel that in view of the lapse of time, since filing the original application, a new application should be filed, setting forth the purpose of the trip, his expected duration in Cuba, his address while there and assurance of his willingness to register with the Swiss Consulate upon his arrival in Havana.

Thereupon, the petitioner filed a new application for validation, wherein he represented that the purpose of his trip to Cuba was to satisfy his curiosity about the state of affairs in Cuba in order to make him a better informed citizen. He represented further, that he expected to stay at the Havana Libre Hotel for approximately two or three weeks and expressed his willingness to register with the Swiss consulate upon his arrival in Havana.

On November 5, 1962, the petitioner was notified by the Deputy Director of the Passport Office that his "present purpose of visiting Cuba does not meet the standards for validation of your passport." It should be emphasized that at the time of the Court's hearing on this motion, petitioner's counsel stated that he was making no claim of illegality on the basis of his client's not having been afforded an administrative hearing with reference to the denial of the passport validation and this Court will therefore consider that he has abandoned any claim of illegality on this ground, notwithstanding its recitation in the complaint.

It is the plaintiff's contention that the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) does not authorize the action taken, that said Act and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185 are unconstitutional, because they interfere with [fol. 62] the rights of a citizen, in this instance the plaintiff, to the right to travel under the Fifth, Ninth and Tenth Amendments; to the freedom of speech, belief and association under the First Amendment and that it is an arbitrary and unreasonable denial of due process under the Fifth Amendment; further, that it is an invalid delegation of legislative power because it does not contain adequate standards and safeguards. The petitioner claims that Executive Order 7856 and Presidential Proclamation 3004 fail to provide adequate standards to guide the Secretary of State in promulgating the regulations and giving proper notice to the American citizen whether said regulations are supported by statute or proclamation; and to the extent that the denial rests upon Executive power over foreign relations, it is still subject to constitutional limitations, and the reasons given by the Secretary do not warrant this judgment.

The plaintiff presently prays for a declaratory judgment and an injunction decreeing that § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185 and the Passport Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. § 211(a) are unconstitutional and that the Secretary of State's regulations,¹ restricting travel to Cuba are thus without any authority in law and are invalid as to

the plaintiff. He also requests that the Secretary of State be directed to validate the petitioner's passport for travel to Cuba, and that he and the Attorney General of the United States be enjoined from interference with his prospective travel or instituting any criminal procedure by reason thereof when consummated.

[fol. 63]

The Three-Judge Court Issue

The preliminary jurisdictional question is whether this proceeding should be heard by a three-judge District Court pursuant to 28 U.S.C. § 2282. This statute requires such a tribunal as a prerequisite to the granting of any "interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution. . . ." The necessary elements for the convocation of such a court are three-fold: (1) The complaint must allege a basis for equitable relief, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); (2) The constitutional question raised must be substantial. *Schneider v. Rusk*, 372 U.S. 224 (1963); and (3) The Complaint must assail an 'Act of Congress', *Jameson & Co. v. Morgen-thau*, 307 U.S. 171 (1939).

A judgment for the plaintiff would put the operation of 22 U.S.C. § 211(a) and 8 U.S.C. § 1185 under the restraint of an equity decree. The constitutional claim is plainly substantial, for in *Kent v. Dulles*, 357 U.S. 116, 130 (1957) the Supreme Court said: "we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect." The Supreme Court's refusal to grant certiorari in three cases² involving geographic restrictions, all arising subsequent to *Kent v. Dulles*, supra, does not render the present claim insubstantial. The Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1922). See also Stern & Gressman, *Supreme Court Practice* § 5-7 (3d ed. 1962).

[fol. 64] The plaintiff claims, *inter alia*, that if §§ 211(a) and 1185 authorize the Secretary to place geographic limita-

tions upon the right to travel, they are unconstitutional by reason of an unlawful delegation of legislative power to the Executive. He argues that a reading of these sections shows that they are devoid of any standards or principles by which the Secretary is guided.

Inasmuch as this plaintiff seeks affirmatively to enjoin the operation of a passport regulatory system, the propriety of empaneling a three-judge tribunal is manifest. The legislative history of § 2282 indicates that it was enacted to prevent a single federal judge from paralyzing the operation of an entire administrative system by the issuance of a broad injunctive order.

"Repeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)." *Kennedy v. Mendoza-Martinez*, supra, at 155.

This is truly a substantial constitutional challenge to the sovereignty of this Nation. This plaintiff's effort to enjoin the Secretary of State from enforcing the statutory law and its attendant regulations is not merely the simple and seemingly harmless application of a lone tourist; it is in fact a pilot case precedent, which if sustained, would open up an immediate thoroughfare for unrestricted travel [fol. 65] between the United States and Cuba. Such an act of judicial audacity would not only defeat the clear intention of Congress as established by law,³ but also strike down the declared foreign policy of the Executive Branch of the National Government.⁴ A substantial constitutional question is in issue. The fact that the statutes' validity and their attendant regulations are in this instance being up-

held, rather than nullified, does not alter the principle. *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952).

All of the necessary elements are present to require that this matter be heard and determined by a three-judge court. 28 U.S.C. § 2282.

[fol. 66]

Merits

The right of a citizen to travel is a part of the "liberty" of which he cannot be deprived, except by due process of law. This precept is recognized and guaranteed under the Fifth Amendment to the Federal Constitution.

"... (T)he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress.... And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.... Where activities of enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles*, supra at 129.

The issue in this case is whether or not geographical passport restrictions imposed by the Secretary of State in respect to travel to Cuba are authorized by Congressional act and if so are those statutes which purport to grant such authority repugnant to constitutional limitations. It is this Court's finding that Congress has granted adequate authority to the Executive department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional.

In considering this constitutional issue the Court is acutely mindful of the separation of powers and that certain areas of government are relegated solely to Congress, others to the Executive and some are common to both. The Executive may act in certain fields until legislative action

[fol. 67] becomes operative and the law-making power then controls. Congress' right to lay statutory restrictions on the President when he treads such legislative ground is conceded unanimously by the Supreme Court; an ample safeguard is available if Congress chooses to apply it. Until Congress does so choose, "we (the Court) should hesitate long before limiting or embarrassing such powers." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). The President is the active agent of the Nation, not of the Congress; and he derives that status directly from the Executive powers vested in him by the Constitution. U. S. Const. Art. II, §§ 1, 2, and 3. He must, of course, obey and carry out the laws enacted by Congress, not because he is subservient, but because the Constitution directs him to do so. Thus it becomes obvious that in certain areas of government the authority of the Legislative and Executive departments overlap; and a concurrent authority of both is cognizable.

"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Fongstoun Co. v. Sawyer*, 343 U.S. 579, 637 (1951) (concurring opinion).

The field of passport regulation and control cuts across the law-making functions of Congress and the Chief Executive's responsibility in the field of foreign affairs.

"We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of 'foreign [fol. 68] affairs.' Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem

that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy." *Worthy v. Herter*, 270 F.2d 905, 910 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959).

Passport control was not designed solely as a protection for internal security. To adopt such thinking would be naive and unrealistic. So many phases of internal security are intertwined with foreign affairs in the administration of passport control that the two become inseparable. This area of government requires a joint-control effort of the Congress and the Executive, if the intended results are to be obtained. It is one where Congress legislates broad laneways of authority to the Executive, within which he must exercise his discretion in effectively administering that authority in a fast changing climate of world affairs.

Congress has provided that the Executive shall take all necessary steps short of an act of war to protect the rights and liberties of American citizens on foreign soil.⁵ Certainly it is consistent with an overall policy that he should exercise that authority granted by law, to prevent incidents occurring in those countries, where normal diplomatic relations are non-existent. Those who would pursue this right of unlimited freedom to travel abroad at will, are those who would not hesitate to criticize their government for failing to protect them, if the need arose. This attitude is not dampened, even when such action could [fol. 69] jeopardize the foreign policy of the Nation. Personal vigilance to safeguard freedom should never be permitted to become a sword used for the destruction of the edifice it protests it is protecting.

In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185.

22 U.S.C.A. § 211(a):

"The Secretary of State may grant and issue passports, . . . under such rules as the President shall designate and prescribe for and on behalf of the

United States, and no other person shall grant, issue, or verify such passports."

8 U.S.C.A. § 1185:

"(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President, or the Congress, be unlawful . . .

Citizens

"(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

On December 16, 1950, the President promulgated Presidential Proclamation 2914,⁶ which declared, for reasons therein set forth, the existence of a national emergency. This executive action preceded and was operative when Congress passed 8 U.S.C. § 1185. Thereafter, on January 17, 1953, pursuant to the foregoing legislation, the President reiterated the existence of the national emergency and accordingly issued a new Presidential Proclamation.⁷ It is to be noted that not only did it promulgate the continued existence of the national emergency previously referred to in the earlier proclamation, but it pointed to the authority emanating from the Immigration and Nationality Act passed by Congress, which became law on

June 27, 1952, as the basis for executive action. This proclamation has never been rescinded or otherwise terminated. The existence of the national emergency still continues.

The House Judiciary Committee of the Congress had compiled for its use in 1958, all those provisions of law which had been brought into effect by the declaration of a national emergency by the President. It was again revised in 1962 and published as the "Report to the Committee on the Judiciary House of Representatives, 'Provisions of Federal Law in Effect in Time of National Emergency'." The foreword of the report prepared by the Committee's Chairman states:

"The emergency proclaimed by the President in 1950 had not yet been terminated and the chronic state of international tensions made it clear that it would not be terminated in the foreseeable future. . . .

"The heightened international tensions which developed in the latter part of 1961 created a new interest in the legal consequences of the actions which might be taken in the cold war by Congress or the President. In particular, there was substantial concern with knowing exactly what legislation would become effective upon the declaration of a national emergency by the President or Congress, or both."

[fol. 71] On Page 23, paragraph 6(c) of this report the statute presently in question, 8 U.S.C. § 1185 appears.

Presidential Proclamation 3004 specifically incorporated by reference the regulations previously prescribed by the Secretary of State and published under Title 22 of the Code of Federal Regulations §§ 53.1 to 53.9; and in addition it authorized the Secretary to revoke, modify or amend these regulations as he might find the interests of the United States to require. The applicable portions provide:

§ 53.1 "The term 'United States' as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 "No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 "No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) " . . .

(b) "When traveling between the United States and any country or territory in North, Central, or South America or in any island adjacent thereto: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: . . .

§ 53.8 "Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

On January 16, 1961 the Secretary of State, pursuant to the authority contained in Presidential Proclamation 3004, amended 22 C.F.R. § 53.3(b) (1958) by Department Regulation 108.456, 26 F.R. 482 so as to provide:

§ 53.3(b) "When traveling between the United States any any country, territory or island adjacent thereto

in North, Central or South America, excluding Cuba:
"

Simultaneously, Public Notice 179 was publicized,⁸ and the Department of State distributed Press Release No. 24⁹ both of which promulgated more fully the purpose of the regulations and the administrative policy of the department in their application.

The issues in this case are clearly distinguishable from *Kent v. Dulles*, supra. The Court there held that these two statutes, 8 U.S.C. § 1185 and 22 U.S.C. § 211(a), did not authorize the Secretary to withhold passports of citizens, because of their beliefs or associations; and that the employment of such a standard could not be used to restrain the citizen's right of free movement.

"We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent v. Dulles*, supra at 128.

[fol. 73]

"The government *may* have the power to forbid the travel of all citizens to particular geographic areas because of war or national emergency. It does not have the power to restrain travel of citizens with whose politics it disagrees." Boudin (Plaintiff's counsel), *The Constitutional Right to Travel*, 56 Colum. L. Rev. 47, 74 (1956).

In the present case, Congress established by law the President's right to regulate and control passport visas within broad bounds of Executive discretion. There has been no claim of arbitrariness in the administration of these regulations. No passport has been claimed to have been denied, because of the applicant's personal beliefs, writings, character, race, religion, or the like. It does in fact bar the travel of all Americans to a specific geographi-

cal area. The mere fact that administratively all tourist travel is banned, while bona fide newspapermen and people with previous business interests in Cuba may be considered as eligible for travel is not an arbitrary criteria which would violate due process.

"... (J)udicial review even of the formula of selection is narrow and it is limited to determining whether the basis of the choice bears some rational relationship to the ends to be served. The distinction made between news agencies with a demonstrated interest in foreign news coverage and individual reporters must have some relevance to the purpose to be achieved. ...

"The foreign policy considerations give the Secretary wide latitude in drawing a line and defining criteria." *Frank v. Herter*, 269 F.2d 245, 247-48 (D.C. Cir. 1959) (concurring opinion), cert. denied, 361 U.S. 918 (1959).¹⁰

The petitioner claims that if that power has been granted to the Executive pursuant to the law-making functions of Congress, the standards must be adequate to pass scrutiny [fol. 74] by the accepted tests. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-30 (1934).

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government." *Locke's Appeal*, 72 Penn. St. 491, 498, quoted in, *Field v. Clark*, 143 U.S. 649, 694 (1891).

"But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." *United States v. Grimaud*, 220 U.S. 506, 521 (1910).

To claim that Congressional statutes which authorize the Executive to make and administer regulations are not constitutional would destroy the theme of legislative action in multiple fields of accepted governmental regulations. The real test to be applied is whether or not the power delegated in this instance is under the circumstances, so vague, indefinite, and lacking in standards, as to constitute an unwarranted and illegal attempt to delegate to the Executive the Legislative power to make law.

The authority granted defined with general specificity the conditions under which the Executive was authorized to act. Both in time of war and upon the declaration by the President of a national emergency, when the President finds that the interests of the United States requires, may these restrictions on travel departure and entry be imposed. The time or term of their application is limited until the President or Congress shall otherwise order. All of the [fol. 75] conditions precedent established by law for the exercise of the power have been fulfilled.¹¹

Government is much like a clock mechanism; in order to perform its functions effectively it must operate. To do so in this area of passport administration, which is so inter-related with foreign affairs, considerable discretion and elbow-room must be granted to the Executive.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 324 (1936).

"It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impractical to appeal to Congress for fur-

ther legislation in each new emergency. Swift Executive action is the only effective counterstroke." *Report of the House Committee on Foreign Affairs*, H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3, quoted in *Kent v. Dulles*, supra at 133 (Clark, J., dissenting).

That part of the plaintiff's prayer for relief which requests that the criminal enforcement provisions of 8 U.S.C. § 1185(c) be enjoined is not warranted. The law complained of is not in contravention to the Federal Constitution. There are no grounds upon which this Court would be justified in interfering with the criminal enforcement aspects of this statute.

[fol. 76]

"The duty to enforce the criminal law is vested by the Constitution not in the judicial arm of the government but in the executive. . . . It would be an improvident trespass upon the separation of the powers, if not a complete usurpation of power, were the court to grant immunity in advance of an actual transaction." *International Longshoremen's Ass'n. v. Seatrains Lines, Inc.*, 212 Fed. Supp. 653, 656 (S.D.N.Y. 1963), *rev'd on other grounds*, Docket No. 28471, 2 Cir., Jan. 27, 1964.

"The court of equity has at times been called upon to enjoin the enforcement of a criminal prosecution. The rule has been firmly established that it will *not* ordinarily intervene to enjoin the enforcement of the law by the prosecuting officials. . . . unless under proper circumstances there would be irreparable injury, and the sole question involved is one of law . . . where a clear legal right to the relief is established." *Reed v. Littleton*, 275 N.Y. 150, 9 N.E.2d 814, 815-16 (1937).

Therefore, the plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted. So ordered.

T. Emmet Clarie, United States District Judge.

I concur in part and dissent in part, with opinion.

J. Joseph Smith, United States Circuit Judge.

I concur in part and dissent in part, with opinion.

M. Joseph Blumenfeld, United States District Judge.

February 20, 1964.

[fpl. 77] ¹ See p. 14 *infra*.

² *Porter v. Herter*, 278 F.2d 280 (D.C. Cir. 1960), *cert. denied*, 361 U.S. 918 (1959); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959); *Frank v. Herter*, 269 F.2d 245 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959).

³ (a) Immigration and Nationality Act of 1952 § 215, 66 Stat. 163, 190, 8 U.S.C. § 1185 (1952).

(b) On October 3, 1962, the Congress passed a joint resolution stating that the United States is determined, *inter alia*: "... to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere. ..." 76 Stat. 697.

⁴ (a) In March of 1963, President Kennedy participated in a conference with the Presidents of the five Central American Republics and Panama. A result of this conference was the Declaration of Costa Rica a passage of which is quoted below:

"The Presidents agree that Ministers of Government of the seven countries should meet as soon as possible to develop and put into immediate effect common measures to restrict the movement of their nationals to and from Cuba, and the flow of material, propaganda and funds from that country.

"This meeting will take action, among other things, to secure stricter travel and passport controls, including appropriate limitations in passports and other travel documents on travel to Cuba. Cooperative arrangements among not only the countries meeting here but also among all OAS members will have to be sought to restrict more effectively not only those movements of people for subversive purposes but also to prevent insofar as possible the introduction of money, propaganda, materials, and arms. Arrangements for additional sea and air surveillance and interception within territorial waters will be worked out with cooperation from the United States." 48 Dept. State Bul. 511, 517 (April 8, 1963).

(b) Pursuant to the agreement entered into in Costa Rica, a meeting of the Ministers of Government took place in April of 1963 at Managua, Nicaragua. Resolution I of that meeting is significant to the instant matter:

"The meeting of Ministers of Government, Interior and Security convoked pursuant to the pertinent section of the Declaration of Central America signed by the Presidents of the seven countries in San Jose, Costa Rica on March 19, 1963

[fol. 78]

AGREES

"To recommend to their Governments that they adopt, within the limitations of their respective constitutional provisions, measures to be put into effect immediately, to prohibit, restrict and discourage the movement of their nationals to and from Cuba. To this end, they propose the adoption of the following measures:

"1) Provide, as a general rule, that every passport or other travel document which may be issued carry a stamp which indicates that said passport is not valid for travel to Cuba.

"2) Declare officially that nationals who are permitted to travel to Cuba should have the permission duly inscribed in their official travel document.

"3) Promulgate regulations restricting the granting of visas to foreigners who have travelled to Cuba within a stipulated period of time.

"4) Notify travel agencies and transport companies of these measures for due compliance; and inform the governments of other countries through the most appropriate means.

"5) Request the Governments of the Hemisphere:

"(a) Not to allow the nationals of signatory countries to travel to Cuba unless they possess a valid passport or other document issued by their country of origin valid for such travel;

"(b) Not to accept visas, tourist cards or other documents issued to their nationals for travel to Cuba which do not form an integral (non-detachable) part of their passports or other travel documents;

"(c) To observe the limitations placed in the passports or other travel documents of the nationals of signatory governments and not allow them to depart for Cuba;

"(d) To inform the signatory countries through appropriate channels of refusal to allow one of their nationals to depart for Cuba; and

"(e) To provide the signatory governments the names of their nationals which may appear on the passenger list of any

airplane or ship going to or coming from Cuba." 48 Dept. State Bull. 719 (May 6, 1963).

[fol. 79] (c) "Embargo On All Trade With Cuba," Proc. No. 3447, 76 Stat. 1446, U.S. Code Cong. and Adm. News 1962, p. 4173.

(d) "Interdiction of the Delivery of Offensive Weapons to Cuba," Proc. No. 3504, 27 F.R. 10401, U.S. Code Cong. and Adm. News 1962, p. 4241.

(e) "Cuban Assets Control Regulations," 31 C.F.R. 515.201 (Supp. 1963).

* 22 U.S.C.A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

* Proc. No. 2914, 64 Stat. A454.

* Proc. No. 3004, 67 Stat. C31:

"WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress, 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

"WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

"WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

"WHEREAS the exigencies of the international situation and [fol. 80] of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

"Now, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

"1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

"2.

"3.

"4.

"5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of Section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

[fol. 81] "To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

* It read:

"In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

"Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

"Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked." 26 Fed. Reg. 492.

* It read:

"The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless [fol. 82] special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those coun-

tries with which the United States does not maintain diplomatic relations." Press Release No. 24.

¹⁰ It is significant to consider, in addition to the statutes in issue in the present case, the basic grant by Congress of power to the Secretary of State. 5 U.S.C.A. § 156: "The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct."

¹¹ See *supra* note 7.

[fol. 83]

SMITH, Circuit Judge, concurring in part, dissenting in part.

I agree with Judge Clarie that a three judge court has jurisdiction, for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports. If §211(a) of the Passport Act of 1926, 22 U.S.C. §211(a) (1958), the sole statute cited in the regulations as a statutory basis, is construed at face value as a delegation of discretionary power to the Executive to impose restrictions on the issuance of passports to American citizens, it poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 192 (1952).

However, I am unable to find in either §211(a) of the Passport Act of 1926 or in §215 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1185 (1958), any basis for the area restrictions in the regulations proclaimed by the State Department. Neither act was designed to meet the present problem. Section 211(a) is nearly identical with the original passport act, 11 Stat. 60 (1856), which was intended to preserve proper respect for American passports by centralizing their issuance in the Federal Government. A number of foreign governments had refused to

recognize American passports that were being issued by local magistrates and officials. At that time no passport was necessary to travel abroad, and Congress hardly intended this statute to authorize the Executive to restrict travel. See Boudin, *The Constitutional Right to Travel*, 56 [fol. 84] COLUM. L. REV. 47, 52-53 (1956); Comment, *Passport Refusals for Political Reasons*, supra; Note, 41 CORN. L.Q. 282 (1956). See also, ASSOC. OF THE BAR OF THE CITY OF N.Y., FREEDOM TO TRAVEL 6-7 (1958). Section 215 of the Immigration and Nationality Act of 1952 was designed to control entry and exit over our borders in time of national emergency by preventing arrival or departure without a valid passport.

Since the right to travel is constitutionally protected, some clear grant of power to curtail it must exist before any infringement of the right to travel is upheld. As the Supreme Court put it in *Kent v. Dulles*, 357 U.S. 116, 129 (1957):

"Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than 'request all whom it may concern to permit safely and freely to pass, and in the case of need to give all lawful aid and protection' to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. . . . [T]he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of Congress . . . And if that power is to be delegated, the standards must be adequate to pass scrutiny by the accepted tests."

Where constitutional rights are restrained, *Kent v. Dulles* requires that we be reluctant to imply a broad grant of power by implication from statutes not clearly designed for the purpose. Hence the Supreme Court construed §211(a) and §215 narrowly to grant the Executive the power to deny a passport on only two grounds: (1) lack of proof of citizenship and allegiance to the United States and (2) [fol. 85] the participation in illegal conduct. "We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, [211(a)] was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." 357 U.S. at 128. If the statutes are to be construed narrowly to preserve individual rights and to avoid constitutional doubts, they cannot be read as the majority read them as granting to the Secretary of State the power to restrict travel to certain foreign areas for any substantive reason he may choose.

Even if one adopts the view of the four dissenters in *Kent v. Dulles*—that the legislative history of the predecessors of §215 and the administrative practice indicated Congressional intent to permit the Secretary of State to exercise his discretion to deny passports to those whose travel might endanger the internal security of the United States—there is no finding that travel to Cuba by Zemel or those similarly situated would endanger the internal security of the United States. Moreover, the language of §215 says nothing about empowering the Secretary of State to restrict travel to certain foreign areas. Rather it says that no citizen shall attempt to enter or leave the United States in time of national emergency without a valid passport. It requires a truly remarkable feat of judicial gymnastics to construe this statute narrowly as a grant of power to [fol. 86] invalidate passports for travel to certain coun-

tries. The regulations themselves did not purport to be based on §215.

I do not understand the majority to adopt the approach of the District of Columbia Court of Appeals in *Worthy v. Herter*, 270 F. 2d 905 (1959), cert. denied 361 U.S. 918 (1959), which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs. *Kent v. Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad. If such inherent power existed, what would be its bounds? Could travel to France be curtailed if the Executive decided that foreign policy required such curtailment to impose sanctions because of De Gaulle's recent recognition of Red China? If so, it is easy to see how "such executive power could, by increasing the number of nations to which travel is excluded while expanding the excepted class of persons for whom travel to such nations is permitted, approach the absolute discretionary control over travel held without warrant in the Constitution by the *Kent* decision." Note, 73 HARV. L. REV. 1610, 1611 (1960).

But the majority seem to suggest that passport control is so intertwined with foreign affairs that Congress must have legislated the Executive. "broad laneways of authority." Rather dubious support for this proposition is sought from 22 U.S.C. §1732 (1958), which requires the President to take steps short of war to secure the release of Americans imprisoned abroad. Still, the entire approach flies in the teeth of the language of *Kent v. Dulles*—"Where activities or enjoyment, natural and often necessary to the [fol. 87] well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129.

We do not pass here on the desirability of area restrictions on travel. I should think Congress might well be justified in this period of international tensions produced by the Cold War in authorizing curtailment of travel to an actively unfriendly nation such as Cuba. It is entirely unrealistic to pretend that there was an end to emergency because of the Korean armistice. However, it is up to

Congress to determine that conditions require a dilution of the freedom to travel through area restrictions on passports. See *Korematsu v. United States*, 323 U.S. 214 (1944), where the Supreme Court upheld the use of the war power to restrict the freedom of movement of citizens of Japanese origin after a Congressional determination of "the greatest imminent danger to the public safety." Cf. *Flynn v. Rusk*, 219 F.Supp. 709 (D.C.D.C. 1963); *Mayer v. Rusk*, 32 L.W. 2274 (D.C.D.C. 1963) (on appeal to the Supreme Court, Dkt. 746). The problem here is that as yet Congress has made no determination that there is an overriding need for area restrictions. After the Supreme Court's decision in *Kent v. Dulles*, President Eisenhower made a special request to Congress for legislation authorizing the Secretary of State, subject to substantive and procedural safeguards, to deny passports to persons whose travel would be inimical to the security or foreign relations of the United States and to impose restrictions on the use of passports by Americans for travel to areas where their presence might conflict with foreign policy objectives. Special Message of July 7, 1958, 104 CONG. REC. 11849, 3 U.S. CODE CONG. & ADMIN. [fol. 88] NEWS 5465, 85th Cong., 2nd Sess. (1958). While legislation making it unlawful for members of Communist organizations to be issued passports has been passed, none of the several bills introduced in recent years to authorize area restrictions on passports has been enacted. *E.g.*, H.R. 13318, 85th Cong., 2nd Sess.

I would hold that such legislation is necessary, for the regulations cannot be supported by the existing statutes, inherent executive power, or by any executive agreement. Even if we assumed that constitutional rights could be overridden by an executive agreement, the Managua Resolution of April 3, 1964 was not an executive agreement. The ministers of the seven nations present agreed only to recommend to their governments the adoption, "within the limitations of their respective constitutional provisions," the restriction and discouragement of the movement of their nationals to Cuba. Area restrictions may be necessary and desirable, but Congress should take the responsibility for authorizing them after a full fact-finding inquiry.

Therefore, I would hold that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority. I respectfully dissent from the denial of a declaratory judgment to that effect. I dissent not because I disapprove of the ends sought by the area restrictions imposed thus far, but because these restrictions are based on a claimed power whose limits are vague and undefined and whose source I cannot specify.

While I disagree, as indicated, with the view that the area restrictions are authorized, and would grant a declaratory judgment that they are not, I would dismiss the action as against the Attorney General as at best premature.

[fol. 89]

BLUMENFELD, District Judge, concurring in part, dissenting in part. I dissent on the ground that this is a case for a district court of one judge.

Jurisdiction

The plaintiff brings this action for an injunction to force the Secretary of State to validate his passport for travel to Cuba. The Secretary bases his refusal on existing State Department regulations.

We are confronted with a threshold question of jurisdiction. The question is whether this is a proper case for convening a three-judge court.

The recent per curiam opinion of the Supreme Court in *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962), sets forth the tests which a district court should apply to determine whether a three-judge court is required:

"When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

There is no doubt that the constitutional question is not plainly insubstantial, see *Bailey v. Patterson*, 369 U.S. 31, 82 S. Ct. 549; 7 L. Ed. 2d 512 (1962), for in *Kent v. Dulles*, 357 U.S. 116, 130, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), the Supreme Court said: "To repeat, we deal here with a constitutional right of the citizen, a right which we must [fol. 90] assume Congress will be faithful to respect." And, a basis for equitable relief is alleged.

But, the case does not "otherwise come[s] within the requirements of the three-judge statute," which reads:

Section 2282 of Title 28:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Here, we are not directly and immediately confronted with the question whether either of the statutes, §211a or §1185, by their terms forbid granting to the plaintiff a passport validated for travel to Cuba. The plaintiff himself conceives that his position in this court is to "properly sue to protect his constitutional rights by alleging that the statute relied upon by the administrative agency does not support the action taken by it, and that if it does it is unconstitutional." Brief for Plaintiff, p. 5 (emphasis added).

This analysis is fairly derived from his specific prayer for relief:

"(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F.R. 492, and in Departmental Regulation 108.456, 26 F.R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, or by Section 215 of the Immigration and

Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, or by Proclamation 3004, 18 F.R. 489." (Plaintiff's Amended Complaint, p. 7)

[fol. 91] The Supreme Court in *Kent v. Dulles*, 357 U.S. at 129-30, treated §135(b) *pari passu* with §211a, although the defendant expressly disclaims reliance upon it here as a source of authority for the regulation excluding travel to Cuba.

The focal point of the plaintiff's attack is clearly upon the regulation itself. "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of §266 . . . In other words it [the plaintiff] seeks a restraint not of a statute, but of an executive action."¹ *Phillips v. United States*, 312 U.S. 246, 252, 61 S. Ct. 489, 85 L. Ed. 800 (1941).

There is no logical escape from the proposition that whenever a regulation is held invalid it must mean either that the statute did not authorize the regulation or that the statute in so authorizing it is unconstitutional. In that event, the constitutional question is always reserved for secondary determination. The court's general doctrine of avoiding constitutional questions whenever possible, see *United States v. Rumely*, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953), is not without significance in determining whether the special three-judge court procedure should be invoked. The decision in *Phillips v. United*

[fol. 92] that an attack upon a state statute was too remote to be cognizant for the procedural purposes of §2281 tested by applying the principles set forth by Mr. Justice Cardozo in *Gully v. First Nat'l Bank*, 299 U.S. 109, 116-18, 57 S. Ct. 96, 81 L. Ed. 70 (1936), to differentiate between stages of adjudication at which issues are reached would seem to compel a like determination here. See *Kesler v.*

¹ Section 266 is the predecessor of §2281 and, although it deals with constitutionality of state statutes, it is fully applicable as in the respect here pertinent it in no way differs from §2282.

Dept. of Public Safety, 369 U.S. 153, 158, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962):

"We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations. But a regulation is not an 'Act of Congress.' As *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173, 59 S. Ct. 804, 83 L. Ed. 1189 (1939); points out, §2282 does not refer to 'an order made by an administrative board or commission' as does §2281 relating to action by states, but confines its requirement for a three-judge court 'to cases of attack upon an 'Act of Congress' upon the ground that 'such Act or any part thereof is repugnant to the Constitution of the United States.'"

The fact that we deal with a constitutional right of a citizen does not mean that the validity of every claimed interference with it must be litigated before a three-judge court. A contrary conclusion is not compelled by a sentence in Mr. Justice Whittaker's opinion in *Florida Lime Growers v. Jacobsen*, 362 U.S. 73, 76-7, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960), that a three-judge court is required whenever a substantial constitutional question is alleged.² The [fol. 93] statutes identified by the plaintiff, §211a and §1185, present no more of an immediate clash between the Act and the Constitution here than they did in *Kent v. Dulles*, where the court in openly failing to reach the question of the constitutionality of the same statutes which the plaintiff claims are involved here, said:

"We would be faced with important constitutional questions were we to hold that Congress by §1185 and §211a had given the Secretary authority to withhold passports

² That statement was made in a special context to refute a claim that a proper reading of §2281 limits the requirement of a three-judge court to cases where the constitutional claim is the sole claim before the court. It would be in point here only if the defendant sought to defeat three-judge court jurisdiction on the ground that the plaintiff had destroyed pristine applicability of §2282 by alternately raising the question whether the President had a right, apart from an Act of Congress, to impose area restrictions reasonably related to the control of foreign relations inherent in the President's plenary power over foreign affairs.

to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." (357 U.S. at 130)

If the Supreme Court did not reach the question whether the same acts of Congress were repugnant to the Constitution in *Kent v. Dulles*, our exercise of jurisdiction as a three-judge court would be to permit the plaintiff in this case to wag the dog of a direct route to review by the Supreme Court simply by grasping the tail of a bare allegation of unconstitutionality of a statute and a prayer for an injunction.

Examination of *Flynn v. Rusk*, 219 F. Supp. 709 (D.D.C. 1963), appeal pending, in which a three-judge district court [fol. 94] was convened, cited by the plaintiff, Brief for Plaintiff, p. 10, discloses a challenge to the constitutionality of the Subversives Control Act of 1950, 64 Stat. 992, 50 U.S.C. 785 (1958), which on its face and in specific terms forbids any member of a communist organization to make application for or use or attempt to use a passport. In *Bauer v. Acheson*, 106 F. Supp. 445 (D. D. C. 1952), a case essentially the same as ours, upon which the plaintiff also relies, the misgivings of Circuit Judge Fahy over the lack of jurisdiction of a three-judge court led him to dissent, stating:

"In my view therefore the case is one for the usual district court composed of a single judge, with right in the parties to appeal from his decision to the Court of Appeals, followed by right of petition to the Supreme Court for review on writ of certiorari. This litigation should not be deemed within the special class of cases committed by Congress to a specially constituted three-judge court, properly convened only when a substantial question is raised as to the constitutionality of an Act of Congress the enforcement, operation or execution of which is sought to be enjoined, with right of direct appeal to the Supreme Court. 28 U.S.C. §2282, *supra*. Plaintiff in the end seeks at most to enjoin action of the Secretary which might be in-

valid because not in conformity with the proper construction of the statute under which he acts. She raises, and there is involved, no substantial question as to the constitutionality of the statute." (106 F. Supp. at 454) (emphasis added)

That *Kent v. Dulles* was considered and decided on the merits by the Supreme Court without suggestion that a three-judge court should have been convened cannot be regarded as an omission by it to notice the route by which the case came before it, for as stated in *Kesler v. Dept. of Public Safety*, in Mr. Chief Justice Warren's dissenting [fol. 95] opinion:

"The question is whether a three-judge court was properly convened for the trial of this case. Although the issue was not considered by the courts below, and has not been raised by the parties here, it is our duty to take independent notice of such matters and to vacate and remand any decree entered by an improperly constituted court." (369 U.S. at 175)³

However the situation might be, if regarded solely on the authority of *Bauer v. Acheson*, we now know that the Supreme Court did not deem an action to enjoin the Secretary of State from refusing to grant a passport on the basis of regulations promulgated under §211a to require the invocation of a three-judge court. Furthermore, in none of three separately considered appeals from summary judgments for the Secretary of State in cases not distinguishable from this one, rendered by a single judge district court after *Kent v. Dulles* was decided did the Court of Appeals for the District of Columbia Circuit make any suggestion

³ This portion of the dissenting opinion did not divide the justices, see 369 U.S. at 155, who rather focused on the question whether an immediate issue of constitutionality was presented. *Id.* at 157.

⁴ Six of the eight circuit judges who had sat en banc on *Kent v. Dulles*, *sub nom. Briehl v. Dulles*, 248 F. 2d 561 (D.C. Cir. 1957), were equally distributed on three separate panels who upon review affirmed single judge district court determinations that state department regulations imposing area restrictions upon passports were valid.

that a three-judge court should have been convened. *Worthy v. Herter*, 270 F. 2d 905 (D.C. Cir.) cert. denied 361 [fol. 96] U.S. 918 (1959); *Frank v. Herter*, 267 F. 2d 245 (D.C. Cir.), cert. denied 361 U.S. 918 (1959); *Porter v. Herter*, 278 F. 2d 280 (D.C. Cir. 1960), cert. denied 361 U.S. 918 (1959).

In my opinion, a three-judge court was improvidently invoked.

Merits

I would deny plaintiff's motion for summary judgment and grant the Secretary of State's motion for summary judgment. For reasons which are set forth at the close of this opinion, I would dismiss the action against the Attorney General.

In the event it should hereafter be decided that this case should be determined by the action of a district judge, it is appropriate that I briefly express my views on the merits.

The statute, §211a, has placed the authority to issue passports in the Secretary of State "under such rules as the President shall designate for and on behalf of the United States." One of those rules provides: "The Secretary of State is authorized in his discretion . . . to restrict it [a passport] against use in certain countries. . . ." 22 C.F.R. §51.75 (1949). Under a claim of authority thus derived from §211a, the Secretary imposed a restriction upon travel to Cuba on January 16, 1961, Public Notice 179. Plaintiff's contention that the purpose of §211a was merely to centralize a ministerial duty to issue passports solely in the [fol. 97] Secretary of State ignores the long standing view "that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." *Kent v. Dulles*, 357 U.S. at 124-25. While the Supreme Court held that the Secretary of State does not have "unbridled discretion to grant or withhold", *Id.* at 129, a passport, §211a was not given such a restricted construction as that for which the plaintiff contends. When the Supreme Court in *Kent v. Dulles* rejected the Secretary's argument that long continued executive construction prior to the 1926 enactment of §211a warranted the inference that he had discretion to

deny a passport on the ground of personal beliefs and associations of a citizen, it pointed out that the scattered rulings affecting communists were insufficient and that the administrative practices which had "jelled" in two categories relating to allegiance and criminal activity were not relevant. But in rejecting the probative value of some and the relevancy of other prior administrative practices to establish that Congress had adopted an interpretation of discretion that embraced the right to deny a passport on the ground of beliefs of a citizen, the Supreme Court did not decide that the Secretary's discretion to deny passports was limited to only those categories which had jelled. The Court went no further than to "hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him *unbridled discretion* [fol. 98] *tion* to grant or withhold a passport for *any* substantive reason he may choose." *Id.* at 128 (emphasis added). It was reiterating what it had already said about discretion: "But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." *Id.* at 125. The point of *Kent v. Dulles* is that the exercise of discretion by the Secretary is subject to judicial scrutiny. See also *Shachtman v. Dulles*, 225 F. 2d 938, 940 (D.C. Cir. 1955). Although the criteria for measuring the Secretary's discretion have not been determined other than it may not be "unbridled", the fact that Congress gave it to the Executive indicates that it is to be exercised in relation to his powers to conduct foreign affairs. See *Shachtman v. Dulles*, 225 F. 2d at 941-42. It is plain to see that Congress was thinking primarily of the recognized power of the President to conduct foreign affairs when through §211a it placed the exclusive authority to issue passports in the *Secretary of State*, the arm of the President in conducting foreign affairs, under "such rules as the President shall designate and prescribe for and on behalf of the United States, . . ." (Emphasis added). Travel to other nations is at least one facet of foreign affairs.

• Plaintiff's claim that § 211a is an unconstitutional delegation of power has no merit. The role of delegation is

governed not only by the conditions surrounding the particular problem in this case, but by general premises underlying the conduct of foreign affairs, the critical phases of [fol. 99] which have always been entrusted to the President and his Secretary of State. The scope and pace of foreign affairs in the condition of the world today would make it impossible for Congress to act without delegation. Where, as here, Congress seeks to implement presidential power, standards other than a reasonable connection to the conduct of foreign affairs are not necessary to constitutionality of the delegating act. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948); See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936). There is no need to consider whether it would fall within the scope of the President's inherent powers. But see *Worthy v. Hexter*.

Although passports are sometimes the subject matter of treaties with other nations, the treaty power may include the power to exclude aliens but not the power to impose travel restrictions upon our own citizens. Treaty powers cannot be used to regulate matters which are purely of domestic concern. See *Power Authority of New York v. FPC*, 247 F. 2d 538 (D.C. Cir.), remanded with direction to dismiss as moot, 355 U.S. 64 (1957).

The question then is whether the Secretary of State through the exercise of the discretion vested in him by the President pursuant to the power delegated by Congress in § 211a may restrict travel to a country with which the United States has broken off diplomatic relations. [fol. 100] The conduct of our relations with other nations is the primary responsibility of the President. *United States v. Curtiss-Wright Export Corp.* In particular, the President has the exclusive power to determine whether to recognize a foreign government and whether to initiate and maintain diplomatic relations. *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). This is not a case like *Kent v. Dulles*, where the passports were denied to certain citizens because of their beliefs and associations. Rather it designates certain parts of the world forbidden to all American travelers. This can hardly be

regarded as arbitrary or capricious by this plaintiff. Cf. *Perkins v. Elg*, 307 U.S. 325, 350 59 S.Ct. 884, 83 L. Ed. 1320 (1939). It relates not to internal security, but to foreign affairs.

The refusal to validate plaintiff's passport for travel to Cuba relates to an exercise of the power to conduct foreign affairs which the Chief Executive already has and is well within the discretion given to the Secretary by the President. The amply sufficient reasons published by the Secretary for the promulgation of the regulation which curtails the plaintiff's right to travel to Cuba were starkly emphasized when this government confronted the Soviet Union with a demand to remove the missiles it had previously brought to Cuba only a few weeks before Zemel began this suit.

I am not inhibited in reaching this result by constitutional considerations, for I believe that the restrictions on the [fol. 101] right to travel that is involved here is a valid one. "The gravest imminent danger to the public safety" is required in order to justify the exclusion of persons from their homes, *Korematsu v. United States*, 323 U.S. 214, 218, 65 S. Ct. 193, 89 L. Ed. 194 (1944), and perhaps a similar showing must be made in order to justify the confinement of a citizen within the boundaries of this country. *Kent v. Dulles*, 357 U.S. at 128. But the right to travel is properly subject to a reasonable prohibition on travel to a particular foreign country which our government believes to be so unfriendly to this nation as to require the severance of diplomatic relations with it. I do not regard the plaintiff's right to see for himself what was happening in Cuba to be of so exalted a nature that it cannot be subjected to restraint during a period when the State Department predicts that such travel might provoke international incidents which would necessitate negotiations, see 22 U.S.C. § 1732 (1958), with a government whose existence the United States is committed to ignore.

It remains to consider plaintiff's claim that § 1185 does not authorize prosecution for violation of an area restriction contained in a passport. Apart from the fact that the Secretary expressly disclaims reliance upon it, that statute is concerned solely with the imposition of sanctions for passport violations, and does not undertake to create pass-

port disqualification limitations. *Briehl v. Dulles*, 248 F. 2d 561, 581 (D.C. Cir. 1957) (Bazelon, J. dissenting), rev'd [fol. 102] *sub. nom. Kent v. Dulles*, 359 U.S. 116 (1958). Since the area restriction in question is a reasonable regulation of the plaintiff's right to travel, the plaintiff's only interest in having the statute construed is to determine whether he may violate a valid restriction without risking sanctions which § 1185 imposes for entry or departure from the United States contrary to its provisions. This is not a sufficient interest to require a construction of § 1185 before it is raised in a criminal proceeding. *Pauling v. Eastland*, 288 F. 2d 126 (D.C. Cir.), cert. denied, 364 U.S. 900 (1960); See *ILA v. Seatrains Lines, Inc.*, 212 F. Supp. 653 (S.D. N.Y. 1963), rev'd on other grounds, Docket No. 28471, 2 Cir., Jan. 27, 1964.

[fol. 103].

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

vs.

DEAN RUSK, Secretary of State, Department of State, and
ROBERT F. KENNEDY, Attorney General, Defendants.

JUDGMENT—March 2, 1964

The above-entitled case having come on to be heard before a three-judge District Court pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284, with all parties appearing by counsel, and the issues having been duly considered and determined by the said Court in its "Memorandum of Decision" filed on February 21, 1964,

It is Accordingly Ordered, Adjudged and Decreed, as follows:

(1) That the motion for summary judgment filed by plaintiff be and is hereby denied;

(2) That the motion for summary judgment filed by Dean Rusk, Secretary of State, be and is hereby granted;

(3) That judgment be and is hereby entered dismissing the action on the merits as against Robert F. Kennedy, Attorney General; and,

(4) That the defendants have and recover from plaintiff their costs in the action.

[fol. 104] Dated at New Haven, Connecticut, this 2nd day of March, 1964.

Gilbert C. Earl, Clerk, United States District Court.

[fol. 105] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

—against—

DEAN RUSK, Secretary of State, Department of State, and
ROBERT F. KENNEDY, Attorney General, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES—Filed March 17, 1964

I. Notice is hereby given that Louis Zemel, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the judgment denying the plaintiff's motion for summary judgment and for a permanent injunction, granting the motion for summary judgment of the defendant, Dean Rusk, Secretary of State, and dismissing the action on the merits as against Robert F. Kennedy, Attorney General, which judgment was dated and entered in this action the 2nd day of March, 1964.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

[fol. 106] III. The following questions are presented by this appeal:

(1) Whether Section 1 of the Passport Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. §211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. §1185 are constitutional on their face and as applied to appellant.

(2) Whether the Secretary of State has been authorized by Congress or has inherent executive power to prohibit travel to Cuba.

Dated, March 16, 1964

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

Gruber & Turkel, 322 Main Street, Stamford, Connecticut,

Attorneys for Louis Zemel, Plaintiff and Appellant.

[fol. 107] Proof of Service (omitted in printing).

[fol. 109] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 110]

SUPREME COURT OF THE UNITED STATES

No. 86—October Term, 1964

LOUIS ZEMEL, Appellant,

vs.

DEAN RUSK, Secretary of State, et al.

Appeal from the United States District Court for the District of Connecticut.

ORDER POSTPONING JURISDICTION—October 12, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

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IN THE
Supreme Court of the United States

October Term, 1964

No. ~~100~~ 86

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	5
Conclusion	11
APPENDIX A—Opinions Below	1a
APPENDIX B—Judgment Below	42a
APPENDIX C—Statutes, Proclamations, Executive Orders and Regulations	43a

Citations

CASES:

Aptheker & Flynn v. Secretary of State, Oct. Term 1963 No. 461, probable jurisdiction noted, 32 U. S. L. Week 3204	2, 9
Bauer v. Acheson, 106 F. Supp. 445 (D. C. Cir. 1952)	2
Bauer v. United States, 244 F. 2d 794 (C. A. 9, 1957)	8
Chastleton Corp. v. Sinclair, 264 U. S. 543	8
Comm'r v. Acker, 361 U. S. 87	9
Connolly v. General Constr. Co., 269 U. S. 385	9
Dennis v. United States, 341 U. S. 494	10
East New York Savings Bank v. Hahn, 326 U. S. 230	8
Florida Lime Growers v. Jacobsen, 362 U. S. 73 ..	2
Frank v. Herter, 269 F. 2d 245 (D. C. Cir. 1959), cert. den. 361 U. S. 918	8

CASES (Cont'd):

Greene v. McElroy, 360 U. S. 474	8
Idlewild Liquor Corp. v. Epstein, 370 U. S. 713 ...	2
Kent v. Dulles, 357 U. S. 116	2, 3, 6, 7, 8, 9, 10
Korematsu v. United States, 323 U. S. 214	6
MacEwan v. Rusk, E. D. Pa. Civ. No. 33038	10
Mendoza-Martinez v. Kennedy, 372 U. S. 144	9
Perez v. Brownell, 356 U. S. 44	9
Porter v. Herter, 278 F. 2d 280 (D. C. Cir. 1960), certiorari denied 361 U. S. 918	8
Rabinowitz & Boudin v. Kennedy, 32 U. S. L. Week 4264	10
Rusk v. Cort, 372 U. S. 144	2
Schneider v. Rusk, 372 U. S. 224	2
Speiser v. Randall, 357 U. S. 513	2
United States v. Laub, et al. (E. D. N. Y. Cr. No. 425)	10
United States v. Travis, S. D. Calif. (Cr. No. 32380 C. D.)	10
Woods v. Miller, 333 U. S. 138	8
Worthy v. Herter, 270 F. 2d 905 (D. C. Cir. 1959); certiorari denied 361 U. S. 918	8
Worthy v. United States, — F. 2d — (C. A. 5th, No. 20,062)	9

UNITED STATES CONSTITUTION:

First Amendment	10
Fifth Amendment	9

STATUTES:

Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009	2
Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1185	2, 3, 5, 6, 7, 8, 9

STATUTES (Cont'd):

Passport Act of 1926, 44 Stat. 887, 22 U. S. C.	
§ 211(a)	2, 3, 6, 7
28 U. S. C. § 1253	2
28 U. S. C. A. § 1391	2
28 U. S. C. § 2201	2
28 U. S. C. § 2282	2
28 U. S. C. § 2284	2
11 Stat. 52	6
40 Stat. 559	7
55 Stat. 252	7

PROCLAMATIONS, EXECUTIVE ORDERS, REGULATIONS:

E. O. No. 7586; 3 F. R. 799	3
Proc. No. 2914, 64 Stat. 454	3
Proc. No. 3004, 67 Stat. c-31	3
22 C. F. R. §§ 51.75-51.77	3
22 C. F. R. §§ 53.1-53.8	3
Press Release No. 24, Dept. of State, Jan. 16, 1961	3, 4
Public Notice No. 179, 26 F. R. 492	3, 4
Dept. of State Reg. 108.456	3, 4

HEARINGS, REPORTS, MISCELLANEOUS:

Hearings before the Senate Committee on Foreign relations on <i>Department of State Passport Poli-</i> <i>cies</i> , 85th Cong., 1st Sess.	7
H. Rep. No. 485, 65th Cong., 2d Sess.	7
H. Rep. No. 1365, 82nd Cong., 2d Sess.	7
S. Rep. No. 444, 77th Cong., 1st Sess.	7

	PAGE
HEARINGS, REPORTS, MISCELLANEOUS (Cont'd):	
S. 4110, 85th Cong., 1st Sess.	7
S. 2287, 86th Cong., 1st Sess.	7
H. R. 2468, 86th Cong., 1st Sess., S. 2287	7
56 Cong. Rec. 6029-6030; 6063-6067; 6193-6195, 6248	7
87 Cong. Rec. 5048-5053; 5086-5088	7
104 Cong. Rec. 11489	7
Chafee, <i>Three Human Rights in the Constitution</i> (1956)	10
<i>Freedom To Travel</i> , Report of the Special Commit- tee to Study Passport Procedures of the Associa- tion of the Bar of the City of New York (1958)	7

IN THE
Supreme Court of the United States

October Term, 1963

No.

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F. KENNEDY,
Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

JURISDICTIONAL STATEMENT

Louis Zemel, the appellant, having appealed from the judgment of the three-judge court of the United States District Court for the District of Connecticut granting appellee Secretary of State's motion for summary judgment, dismissing appellant's action on the merits as against the appellee Attorney General, and denying appellant's motion for summary judgment and his request for an injunction, submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinions below (R. 59-102; Appendix A, *infra*) have not yet been officially reported.

Jurisdiction

Appellant brought this action in the United States District Court for the District of Connecticut for a judgment (a) declaring that appellant is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose; (b) declaring unconstitutional the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211(a) and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185; (c) enjoining the Secretary of State, because of the unconstitutionality of the said statutes, from enforcing them by refusing to endorse appellant's passport for travel to Cuba; and (d) enjoining both appellees from interfering with appellant's travel to Cuba.

The action was brought under 28 U. S. C. §§ 1391, 2201, 2282 and 2284, and under Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009 (R. 9).

The judgment below (R. 103, Appendix B, *infra*) is dated and was entered on March 2, 1964. Appellant filed a notice of appeal in the court below on March 16, 1964 (R. 105).

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. § 1253. The following decisions sustain the Court's jurisdiction: *Aptheker and Flynn v. Secretary of State*, Oct. Term, 1963, No. 461, prob. juris. noted—U. S. — (1963); *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73; *Bauer v. Acheson*, 106 F. Supp. 445 (D. D. C. 1952); *Rusk v. Cort*, 372 U. S. 144; *Speiser v. Randall*, 357 U. S. 513; *Kent v. Dulles*, 357 U. S. 116.

Statutes Involved

The statutes involved in this case are those considered by the Court in *Kent v. Dulles*, 357 U. S. 116, and are set forth in Appendix C, *infra*, pp. 43a *et seq.*

The following are the two statutes and their implementing regulations:

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. § 211(a) (giving the Secretary of State exclusive authority to issue passports), *infra*, p. 43a.

Executive Order No. 7856 of 1938, 3 F. R. 799, 22 CFR 51.75-51.77 (authorizing the Secretary to restrict a passport against "use" in certain countries, *infra*, p. 46a.

2. The Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U. S. C. 1485 (making it unlawful during war or emergency for a citizen "to depart from or enter" the United States without a passport), *infra*, p. 43a.

Presidential Proclamation No. 2914, 64 Stat. A454 (declaring the existence of the Korean emergency), *infra*, p. 46a.

Presidential Proclamation No. 3004, 67 Stat. C31 (making departure and entry of citizens subject to regulation by Secretary of State), *infra*, p. 48a.

Regulations of the Department of State, 22 CFR 53.1-53.8 as amended by Departmental Regulation 108.456, 26 F. R. 482 (requiring passports for departure and entry except for travel to certain countries in the western hemisphere), *infra*, p. 50a.

Public Notice 179, 26 F. R. 492, *infra*, p. 52a.

Press Release No. 24, Jan. 16, 1961, *infra*, p. 53a.

Questions Presented

1. Whether the Secretary of State is authorized by the aforesaid statutes to prohibit, upon pain of criminal prosecution, the travel of American citizens to and from Cuba.

2. Whether the Secretary has inherent non-statutory authority to exercise such power.

3. Whether the emergency conditions set forth in the statutes and in the Executive orders are presently in effect.

4. Whether the statutes, as construed and applied to appellant, are constitutional.

5. Whether an action will lie against the Attorney General and the Secretary of State to restrain their enforcement of the above statutes.

Statement of the Case

Appellant is a citizen of the United States holding a valid American passport. On March 31, 1962 he requested the Secretary to validate that passport for travel to Cuba. Prior thereto, on January 16, 1961, the Secretary of State had sought to prohibit travel to Cuba in the following manner (R. 10): (1) He announced publicly that United States passports were invalid for such travel unless specifically endorsed for that purpose (Press Release 24); (2) he issued a public notice to the same effect (Public Notice 179, 26 F. R. 492); (3) he issued Departmental Regulation 108.456, amending 22 C. F. R. 53.3(b) exempting Cuba from those countries in the western hemisphere for which a passport is not required of United States citizens (26 F. R. 482-483).

In addition, the Secretary publicly threatened criminal proceedings against American citizens travelling to Cuba without specially endorsed passports for such travel, and

such criminal prosecutions had been instituted against American citizens under 8 U. S. C. 1185 (R. 11-12). The complaint also alleges that appellees had caused common carriers and foreign governments to obstruct the travel of American citizens to Cuba (R. 12).

On April 18, 1962 and on November 5, 1962 the Secretary declined to endorse appellant's passport for travel to Cuba (R. 12).

Thereupon, appellant instituted an action against appellees for a judgment declaring that he had a right to travel to Cuba, ordering that his passport be endorsed for that purpose, and declaring unconstitutional the statutes upon which the Secretary relied. In addition, appellant sought to enjoin both appellees from interfering in any way with his travel to Cuba "by way of passport cancellation, denial of future passport facilities, institution of criminal proceedings, advice or instructions to other governments and to common carriers, or other actions against the plaintiff by reason of his prospective travel to Cuba and such travel when consummated" (R. 16).

A three-judge court was duly appointed (R. 36). It thereafter denied appellant's motion for summary judgment, granted the Secretary's motion for summary judgment, and dismissed the action on the merits as against the Attorney General (R. 103-104). Each member of the Court wrote a separate opinion (R. 59-102). Circuit Judge Smith dissented from the court's action insofar as it denied relief against the Secretary (R. 83).

The Questions Are Substantial

The decision below raises substantial questions as to the Secretary's inherent and statutory authority to impose area restrictions with punitive sanctions upon the foreign travel of American citizens in peacetime and the constitutionality of such action. The majority opinions in the court below appear to be in conflict with this Court's de-

cision in *Kent & Briehl v. United States*, 357 U. S. 116, which held that the right to travel was protected by the Constitution and was subject to restriction only where, upon a showing of the gravest imminent danger to the public safety (citing *Korematsu v. United States*, 323 U. S. 214, 218), "the Congress and the Chief Executive moved in coordinated action" (357 U. S. 116, 128).

1. The conclusion of the court below that the Passport Act of 1926 (herein called the Passport Act) and Section 215 of the Immigration and Nationality Act of 1952 (herein called Section 215) authorize the Secretary to impose area restrictions appears contrary to the plain wording of those statutes, to the principles of construction applied by this Court in *Kent*, and to the legislative history of the statutes. As the dissenting judge indicated, "Neither Act was designed to meet the present problem" (R. 83).

a) The Passport Act provides that "the Secretary of State may grant and issue passports . . . under such rules as the President shall designate . . ." It codifies a century-old statute (11 Stat. 52 (1856)) intended, as this Court held in *Kent*, to prevent anyone but the Secretary from issuing passports (357 U. S. 116, 123-125, 128-130). The Act does not in terms authorize the Secretary to forbid travel to areas designated by the Secretary. Thus to construe the statute "poses a problem of invalid delegation, for there are no standards in the statutory language; legislative history, or administrative practice" (Judge Smith, dissenting at R. 83). At the time of its passage, passports were not a requisite for lawful entry and exit (*Ibid.*). There is no administrative practice under which travel to countries excepted from the passport is treated as illegal. (*Ibid.*).

b) Section 215 similarly contains no restrictions upon the places to which one may travel. It merely establishes border control by making it illegal for citizens to "depart from or enter the United States" during war or national emergency without a passport.

The legislative history of the statute and of its 1918 and 1941 predecessors (40 Stat. 559; 55 Stat. 252) supports this conclusion as to the purpose of Section 215. Its "chief object" was to obstruct "aliens and alien enemies and renegade citizens" who "can now enter and depart without any power * * * to intercept or delay them" (56 Cong. Rec. 2192).¹ It was never suggested that area restrictions, as well as border control, were within the purview of the statute. As Judge Smith said in this very case, " * * * I am unable to find in either § 211(a) of the Passport Act of 1926 or in § 215 of the Immigration and Nationality Act of 1952 (8 U. S. C. § 1185 (1958)) any basis for the area restrictions in the regulations proclaimed by the State Department" (R. 83).

This view that the statute was not intended to authorize area restrictions or to penalize violators of such restrictions is supported by the Solicitor General's brief in *Kent*, *supra* (Br. p. 56, n. 57), by the Department of State's reluctance before Congressional committees to claim the existence of this power,² and by authoritative commentators.³ Further, within three weeks after this Court's decision in *Kent*, the President requested Congress to authorize the imposition of area limitations (104 Cong. Rec. 11489); Congress did not comply.

2. The case may also present the important question of whether the Executive has inherent power to prevent travel, as the appellees have asserted that "the Execu-

¹ The 1918 statute: see H. R. Rep. No. 485, 65th Cong. 2d Sess., 56 Cong. Rec. 6029-6030, 6063-6067, 6191-6195, 6248. The 1941 statute; see Sen. Rep. No. 444, 77th Cong. 1st Sess. (1941), 87 Cong. Rec. 5048-5053, 5086, 5388. The current statute incorporates this history (H. R. Rep. No. 1365, 82nd Cong. 2d Sess. 53).

² See, e.g., Hearings before the Committee on Foreign Relations, United States Senate, 85th Cong. 1st Sess., on *Department of State Passport Policies*, pp. 3, 14-15, 18, 40, 54, 56, 59, 78.

³ *Freedom to Travel*, Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York 70 (1958).

tive may properly prevent travel by the United States citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations" (R. 24). That appears to have been the *raison d'être* of an earlier case in which court and counsel gave scant consideration to the statutes here involved, *Worthy v. Herter*, 270 F. 2d 905 (D. C. Cir. 1959), *cert. den.*, 361 U. S. 918 (1950).⁴ In contrast, the court below addressed itself essentially to the issue of legislative authority. As Circuit Judge Smith said, "I do not understand the majority to adopt the approach of the District of Columbia Court of Appeals in *Worthy v. Herter* * * *. *Kent v. Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad." (R. 86).

3. This case presents the further question whether the state of emergency declared in 1953 during the Korean War is presently in effect so as to justify the current restrictions on travel to Cuba. It is highly doubtful that the congressional purpose embodied in the Act of 1952 justifies a current claim of emergency where the conditions leading to the original declaration have long since elapsed. See *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547-548; *East New York Savings Bank v. Hahn*, 326 U. S. 230, 235; *Woods v. Miller*, 333 U. S. 138, 147; *Bauer v. United States*, 244 F. 2d 794, 797 (C. A. 9th 1957). Review of the continued validity of an outdated declaration of emergency is particularly appropriate where civil liberties are involved. In any event, even if the President were somehow authorized to take these novel steps to limit travel of American citizens to particular areas, there is no indication that he has authorized the Secretary of State to do so. See *Greene v. McElroy*, 360 U. S. 474, 496.

⁴ This decision was regarded as binding upon the same court in *Frank v. Herter*, 269 F. 2d 245 (D. C. Cir. 1959), *cert. den.* 361 U. S. 918 (1959), and *Porter v. Herter*, 278 F. 2d 280 (D. C. Cir. 1960), *cert. den.* 361 U. S. 918 (1960).

4. The construction by the Court below presents a host of serious constitutional problems. It is not the narrow construction explicitly required by the Court in *Kent*, 357 U. S. at 129, where "activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved," or traditionally imposed upon a criminal statute (see, e.g. *Com'r v. Acker*, 361 U. S. 87, 91). The construction below also unnecessarily creates problems of vagueness (see *Connally v. General Construction Company*, 269 U. S. 385, 391) and of the delegation of legislative authority discussed by this Court in *Kent*, 357 U. S. 116, 129.

More important, substantial problems are presented under the due process clause of the Fifth Amendment which *Kent* specifically held applicable to protect the basic liberty of movement. Here, no more than in *Kent* is a nation at war, or is there a showing of extremity or of anything approaching "the gravest imminent danger to the public safety". *Kent v. Dulles*, 357 U. S. 116, 128, citing *Korematsu v. United States*, 323 U. S. 214, 218. On the contrary, the statute is not claimed to be the wartime instrument intended by Congress (*supra*, p. 7). There is no claim that travel to Cuba creates a clear and present danger. Cf. *Aptheker and Flynn v. Secretary of State*, Oct. Term, 1963, No. 461. Instead, the restriction is sought to be justified solely as an instrument of foreign policy. The connection with foreign policy, however, is even more tenuous here than in *Perez v. Dulles*, 356 U. S. 44, involving the claim of active participation in another nation's political affairs; cf. Mr. Justice Brennan's concurring opinion in *Mendoza-Martinez v. Kennedy* and *Rusk v. Cort*, 372 U. S. 144.⁵

⁵ Consideration may also be required as to the effect upon the "departure" part of Section 215 of the recent holding that the "entry" part is unconstitutional. *Worthy v. United States*, C. A. 5th, No. 20,062, -- F. 2d -- (C. A. 5, 1964).

The decision below also raises important questions under the First Amendment. This Court has indicated how the exercise of First Amendment rights may depend upon liberty of movement. It adopted Professor Chafee's view, so apposite here, that "[a]n American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers", Chafee, *Three Human Rights in the Constitution* (1956), 171, 195-196, quoted in *Kent v. Dulles*, 357 U. S. 116, 125-127. Whatever restrictions upon liberty may be permissible in war or national danger, cf. *Dennis v. United States*, 341 U. S. 494, First Amendment rights cannot be curtailed for so-called foreign policy considerations.

5. The statutory and constitutional questions presented in this case do not constitute an isolated instance of injury. On the contrary, they are of importance to the well-being of thousands of American citizens who desire to exercise their right to travel free from official restriction. This is demonstrated by the substantial amount of litigation pending in the federal courts involving various aspects of the right to travel to Cuba, *United States v. Travis*, S. D. Cal., No. 32380; *Worthy v. United States*, C. A. 5th, No. 20,062; *MacEwan v. Rusk*, E. D. Pa., Civ. No. 33038, appeal pending, C. A., 3rd Cir.; *United States v. Laub, et al.*, E. D. N. Y. Cr. No. 425 (1963).

6. The dismissal of the action against the Attorney General on the ground that he was not a proper party defendant raises a separate and important jurisdictional question. It overlooks the fact that, as the complaint alleges, the Attorney General, independent of the Secretary of State, is imposing certain sanctions in the field of travel. The threat of criminal proceedings against appellant as well as against common carriers which may transport him presents a substantial question of justiciability that was considered, but not decided by this Court in *Rabinowitz v. Kennedy*, — U. S. —, 32 U. S. Law Week 4264.

CONCLUSION

The questions are substantial and the Court should note probable jurisdiction.

Respectfully submitted,

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May 13, 1964

APPENDIX A

Opinion Below

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL,

Plaintiff,

against

DEAN RUSK, Secretary of State, Department of State,
and ROBERT F. KENNEDY, Attorney General,
Defendants.

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, a citizen of the United States and residing within this judicial district, has brought this action against Dean Rusk, Secretary of State of the United States and Robert F. Kennedy, the Attorney General of the United States for a declaratory judgment and to enjoin the enforcement and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. §§ 1185, both of which the plaintiff claims are repugnant to the Constitution. Jurisdiction of this Court is invoked under Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U. S. C. § 1009 and 28 U. S. C. §§ 1391 and 2201; and pursuant to 28 U. S. C. §§ 2282 and 2284 a three-judge court was convened to pass upon the constitutional questions in issue.

Appendix A—Opinion Below

Cross motions have been filed by the respective parties, pursuant to Rule 56, Fed. R. Civ. P., for the entry of summary judgment based on the representation of both parties that there exists in this case no genuine issue as to any material fact. Having heard the arguments of counsel for the respective parties and having considered their amended pleadings, affidavits, briefs and other papers on file, the Court is of the opinion that the plaintiff's motion for summary judgment should be denied and the defendants' motion for summary judgment should be granted.

The material facts are undisputed. On March 31, 1962, while the plaintiff was the holder of a valid United States passport of standard form and duration, he applied by letter to the Director of the Passport Office at Washington, D. C., for permission to have his passport validated for travel to Cuba as a tourist. The Passport Office denied him the permission requested, with the explanation that only persons whose travel might be in the best interests of the United States, such as newsmen and businessmen with previously established interests, could be eligible; and specifically that tourist travel was excluded. Thereafter, on May 1, 1962, the petitioner requested a hearing on his application without reciting any new reason, except that he felt justified in wanting to make the trip. He was sent a copy of the current Administrative Procedures of the Passport Office and advised by the acting Deputy Director, citing 22 C. F. R. 51.170 (1958), that in those instances where foreign travel was restricted by geographical limitations, which were generally applicable to everyone, no administrative procedures for review or appeal were provided. Subsequently, on October 11, 1962, the petitioner through his attorney advised the Passport Office by letter, that the former had acquired a new passport and renewed petitioner's request for its validation and a review of any denial. The department advised counsel that in view of the lapse of time, since filing the original application, a new

Appendix A—Opinion Below

application should be filed, setting forth the purpose of the trip, his expected duration in Cuba, his address while there and assurance of his willingness to register with the Swiss Consulate upon his arrival in Havana.

Thereupon, the petitioner filed a new application for validation, wherein he represented that the purpose of his trip to Cuba was to satisfy his curiosity about the state of affairs in Cuba in order to make him a better informed citizen. He represented further, that he expected to stay at the Havana Libre Hotel for approximately two or three weeks and expressed his willingness to register with the Swiss consulate upon his arrival in Havana.

On November 5, 1962, the petitioner was notified by the Deputy Director of the Passport Office that his "present purpose of visiting Cuba does not meet the standards for validation of your passport." It should be emphasized that at the time of the Court's hearing on this motion, petitioner's counsel stated that he was making no claim of illegality on the basis of his client's not having been afforded an administrative hearing with reference to the denial of the passport validation and this Court will therefore consider that he has abandoned any claim of illegality on this ground, notwithstanding its recitation in the complaint.

It is the plaintiff's contention that the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211(a) does not authorize the action taken, that said Act and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. § 1185 are unconstitutional, because they interfere with the rights of a citizen, in this instance the plaintiff, to the right to travel under the Fifth, Ninth and Tenth Amendments; to the freedom of speech, belief and association under the First Amendment and that it is an arbitrary and unreasonable denial of due process under the Fifth Amendment; further, that it is an invalid delegation of legislative power because it does not contain adequate standards and

Appendix A—Opinion Below

safeguards. The petitioner claims that Executive Order 7856 and Presidential Proclamation 3004 fail to provide adequate standards to guide the Secretary of State in promulgating the regulations and giving proper notice to the American citizen whether said regulations are supported by statute or proclamation; and to the extent that the denial rests upon Executive power over foreign relations, it is still subject to constitutional limitations, and the reasons given by the Secretary do not warrant this abridgement.

The plaintiff presently prays for a declaratory judgment and an injunction decreeing that § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. § 1185 and the Passport Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. § 211(a) are unconstitutional and that the Secretary of State's regulations,¹ restricting travel to Cuba are thus without any authority in law and are invalid as to the plaintiff. He also requests that the Secretary of State be directed to validate the petitioner's passport for travel to Cuba, and that he and the Attorney General of the United States be enjoined from interference with his prospective travel or instituting any criminal procedure by reason thereof when consummated.

THE THREE-JUDGE COURT ISSUE

The preliminary jurisdictional question is whether this proceeding should be heard by a three-judge District Court pursuant to 28 U. S. C. § 2282. This statute requires such a tribunal as a prerequisite to the granting of any "interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution. . . ." The necessary elements for the convocation of such a court are three-fold:

¹ See p. 14 *infra* (17a).

Appendix A—Opinion Below

(1) The complaint must allege a basis for equitable relief, *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963); (2) the constitutional question raised must be substantial. *Schneider v. Rusk*, 372 U. S. 224 (1963); and (3) The Complaint must assail an 'Act of Congress', *Jameson & Co. v. Morgenthau*, 307 U. S. 171 (1939).

A judgment for the plaintiff would put the operation of 22 U. S. C. § 211(a) and 8 U. S. C. § 1185 under the restraint of an equity decree. The constitutional claim is plainly substantial, for in *Kent v. Dulles*, 357 U. S. 116, 130 (1957) the Supreme Court said: "we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect." The Supreme Court's refusal to grant certiorari in three cases² involving geographic restrictions, all arising subsequent to *Kent v. Dulles*, *supra*, does not render the present claim insubstantial. The Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, . . ." *United States v. Carver*, 260 U. S. 482, 490 (1922). See also STERN & GRESSMAN, SUPREME COURT PRACTICE § 5-7 (3d ed. 1962).

The plaintiff claims, *inter alia*, that if §§ 211(a) and 1185 authorize the Secretary to place geographic limitations upon the right to travel, they are unconstitutional by reason of an unlawful delegation of legislative power to the Executive. He argues that a reading of these sections shows that they are devoid of any standards or principles by which the Secretary is guided.

Inasmuch as this plaintiff seeks affirmatively to enjoin the operation of a passport regulatory system, the propriety of empaneling a three-judge tribunal is manifest. The legislative history of § 2282 indicates that it was en-

² *Porter v. Herter*, 278 F. 2d 280 (D. C. Cir. 1960), *cert. denied*, 361 U. S. 918 (1959); *Worthy v. Herter*, 270 F. 2d 905 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 918 (1959); *Frank v. Herter*, 269 F. 2d 245 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 918 (1959).

Appendix A—Opinion Below

acted to prevent a single federal judge from paralyzing the operation of an entire administrative system by the issuance of a broad injunctive order.

"Repeatedly emphasized during the congressional debates on, § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)." *Kennedy v. Mendoza-Martinez, supra*, at 155.

This is truly a substantial constitutional challenge to the sovereignty of this Nation. This plaintiff's effort to enjoin the Secretary of State from enforcing the statutory law and its attendant regulations is not merely the simple and seemingly harmless application of a lone tourist; it is in fact a pilot case precedent, which if sustained, would open up an immediate thoroughfare for unrestricted travel between the United States and Cuba. Such an act of judicial audacity would not only defeat the clear intention of Congress as established by law,³ but also strike down the declared foreign policy of the Executive Branch of the

³ (a) Immigration and Nationality Act of 1952 § 215, 66 Stat. 163, 190, 8 U. S. C. § 1185 (1952).

(b) On October 3, 1962, the Congress passed a joint resolution stating that the United States is determined, *inter alia*: "... to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere. . . ." 76 Stat. 697.

Appendix A—Opinion Below

National Government.⁴ A substantial constitutional question is in issue. The fact that the statutes' validity and their attendant regulations are in this instance being upheld, rather than nullified, does not alter the principle. *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D. D. C. 1952).

⁴ (a) In March of 1963, President Kennedy participated in a conference with the Presidents of the five Central American Republics and Panama. A result of this conference was the Declaration of Costa Rica a passage of which is quoted below:

"The Presidents agree that Ministers of Government of the seven countries should meet as soon as possible to develop and put into immediate effect common measures to restrict the movement of their nationals to and from Cuba, and the flow of material, propaganda and funds from that country.

"This meeting will take action, among other things, to secure stricter travel and passport controls, including appropriate limitations in passports and other travel documents on travel to Cuba. Cooperative arrangements among not only the countries meeting here but also among all OAS members will have to be sought to restrict more effectively not only those movements of people for subversive purposes but also to prevent insofar as possible the introduction of money, propaganda, materials, and arms. Arrangements for additional sea and air surveillance and interception within territorial waters will be worked out with cooperation from the United States." 48 Dept. State Bull. 511, 517 (April 8, 1963).

(b) Pursuant to the agreement entered into in Costa Rica, a meeting of the Ministers of Government took place in April of 1963 at Managua, Nicaragua. Resolution I of that meeting is significant to the instant matter:

"The meeting of Ministers of Government, Interior and Security convoked pursuant to the pertinent section of the Declaration of Central America signed by the Presidents of the seven countries in San Jose, Costa Rica on March 19, 1963

AGREES

"To recommend to their Governments that they adopt, within the limitations of their respective constitutional provisions, measures to be put into effect immediately, to prohibit, restrict and discourage the movement of their nationals to and from Cuba.

Appendix A—Opinion Below

All of the necessary elements are present to require that this matter be heard and determined by a three-judge court.
28 U. S. C. § 2282.

To this end, they propose the adoption of the following measures:

"1) Provide, as a general rule, that every passport or other travel document which may be issued carry a stamp which indicates, that said passport is not valid for travel to Cuba.

"2) Declare officially that nationals who are permitted to travel to Cuba should have the permission duly inscribed in their official travel document.

"3) Promulgate regulations restricting the granting of visas to foreigners who have travelled to Cuba within a stipulated period of time.

"4) Notify travel agencies and transport companies of these measures for due compliance; and inform the governments of other countries through the most appropriate means.

"5) Request the Governments of the Hemisphere:

"(a) Not to allow the nationals of signatory countries to travel to Cuba unless they possess a valid passport or other document issued by their country of origin valid for such travel;

"(b) Not to accept visas, tourist cards or other documents issued to their nationals for travel to Cuba which do not form an integral (non-detachable) part of their passports or other travel documents;

"(c) To observe the limitations placed in the passports or other travel documents of the nationals of signatory governments and not allow them to depart for Cuba;

"(d) To inform the signatory countries through appropriate channels of refusal to allow one of their nationals to depart for Cuba; and

"(e) To provide the signatory governments the names of their nationals which may appear on the passenger list of any airplane or ship going to or coming from Cuba." 48 Dept. State Bull. 719 (May 6, 1963).

(c) "Embargo On All Trade With Cuba", Proc. No. 3447, 76 Stat. 1446, U. S. Code Cong. and Adm. News 1962, p. 4173.

(d) "Interdiction of the Delivery of Offensive Weapons to Cuba", Proc. No. 3504, 27 F. R. 10401, U. S. Code Cong. and Adm. News 1962, p. 4241.

(e) "Cuban Assets Control Regulations", 31 C. F. R. 515.201 (Supp. 1963).

*Appendix A—Opinion Below***MERITS**

The right of a citizen to travel is a part of the "liberty" of which he cannot be deprived, except by due process of law. This precept is recognized and guaranteed under the Fifth Amendment to the Federal Constitution.

"... (T)he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them". *Kent v. Dulles*, supra at 129.

The issue in this case is whether or not geographical passport restrictions imposed by the Secretary of State in respect to travel to Cuba are authorized by Congressional act and if so are those statutes which purport to grant such authority repugnant to constitutional limitations. It is this Court's finding that Congress has granted adequate authority to the Executive department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U. S. C. A. § 211(a) and 8 U. S. C. A. § 1185 are valid and constitutional.

In considering this constitutional issue the Court is acutely mindful of the separation of powers and that certain areas of government are relegated solely to Congress, others to the Executive and some are common to both. The Executive may act in certain fields until legislative action

Appendix A—Opinion Below

becomes operative and the law-making power then controls. Congress' right to lay statutory restrictions on the President when he treads such legislative ground is conceded unanimously by the Supreme Court; an ample safeguard is available if Congress chooses to apply it. Until Congress does so choose, "we (the Court) should hesitate long before limiting or embarrassing such powers". *Mackenzie v. Hare*, 239 U. S. 299, 311 (1915). The President is the active agent of the Nation, not of the Congress; and he derives that status directly from the Executive powers vested in him by the Constitution. U. S. Const. Art. II, §§ 1, 2, and 3. He must, of course, obey and carry out the laws enacted by Congress, not because he is subservient, but because the Constitution directs him to do so. Thus it becomes obvious that in certain areas of government the authority of the Legislative and Executive departments overlap; and a concurrent authority of both is cognizable.

"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain". *Youngstown Co. v. Sawyer*, 343 U. S. 579, 637 (1951) (concurring opinion).

The field of passport regulation and control cuts across the law-making functions of Congress and the Chief Executive's responsibility in the field of foreign affairs.

"We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of 'foreign affairs'. Such a determination involves information gleaned through diplomatic

Appendix A—Opinion Below

sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy". *Worthy v. Herter*, 270 F. 2d 905, 910 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 918 (1959).

Passport control was not designed solely as a protection for internal security. To adopt such thinking would be naive and unrealistic. So many phases of internal security are intertwined with foreign affairs in the administration of passport control that the two become inseparable. This area of government requires a joint-control effort of the Congress and the Executive, if the intended results are to be obtained. It is one where Congress legislates broad laneways of authority to the Executive, within which he must exercise his discretion in effectively administering that authority in a fast changing climate of world affairs.

Congress has provided that the Executive shall take all necessary steps short of an act of war to protect the rights and liberties of American citizens on foreign soil.⁵ Certainly it is consistent with an overall policy that he

⁵ 22 U. S. C. A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

Appendix A—Opinion Below

should exercise that authority granted by law, to prevent incidents occurring in those countries, where normal diplomatic relations are non-existent. Those who would pursue this right of unlimited freedom to travel abroad at will, are those who would not hesitate to criticize their government for failing to protect them, if the need arose. This attitude is not dampened, even when such action could jeopardize the foreign policy of the Nation. Personal vigilance to safeguard freedom should never be permitted to become a sword used for the destruction of the edifice it protests it is protecting.

In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. § 1185.

22 U. S. C. A. § 211(a):

“The Secretary of State may grant and issue passports, . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.”

8 U. S. C. A. § 1185:

“(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President, or the Congress, be unlawful. . . .

*Appendix A—Opinion Below***"CITIZENS**

"(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, ~~except as otherwise provided by the President~~, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

On December 16, 1950, the President promulgated Presidential Proclamation 2914,⁶ which declared, for reasons therein set forth, the existence of a national emergency. This executive action preceded and was operative when Congress passed 8 U. S. C. § 1185. Thereafter, on January 17, 1953, pursuant to the foregoing legislation, the President reiterated the existence of the national emergency and accordingly issued a new Presidential Proclamation.⁷ It

⁶ Proc. No. 2914, 64 Stat. A454.

⁷ Proc. No. 3004, 67 Stat. C31:

"WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

"WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

"WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No.

Appendix A—Opinion Below

is to be noted that not only did it promulgate the continued existence of the national emergency previously referred to in the earlier proclamation, but it pointed to the authority

2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

"WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

"NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

"1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

"2. . . .

"3. . . .

"4. . . .

"5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any sub-

Appendix A—Opinion Below

emanating from the Immigration and Nationality Act passed by Congress, which became law on June 27, 1952, as the basis for executive action. This proclamation has never been rescinded or otherwise terminated. The existence of the national emergency still continues.

The House Judiciary Committee of the Congress had compiled for its use in 1958, all those provisions of law which had been brought into effect by the declaration of a national emergency by the President. It was again revised in 1962 and published as the "Report to the Committee on the Judiciary House of Representatives, 'Provisions of Federal Law in Effect in Time of National Emergency'." The foreword of the report prepared by the Committee's Chairman states:

"The emergency proclaimed by the President in 1950 had not yet been terminated and the chronic state of international tensions made it clear that it would not be terminated in the foreseeable future.

"The heightened international tensions which developed in the latter part of 1961 created a new interest in the legal consequences of the actions which

sequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of Section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

"To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

Appendix A—Opinion Below

might be taken in the cold war by Congress or the President. In particular, there was substantial concern with knowing exactly what legislation would become effective upon the declaration of a national emergency by the President or Congress, or both."

On Page 23, paragraph 6(c) of this report the statute presently in question, 8 U. S. C. § 1185 appears.

Presidential Proclamation 3004 specifically incorporated by reference the regulations previously prescribed by the Secretary of State and published under Title 22 of the Code of Federal Regulations §§ 53.1 to 53.9; and in addition it authorized the Secretary to revoke, modify or amend these regulations as he might find the interests of the United States to require. The applicable portions provide:

§ 53.1 "The term 'United States' as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 "No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3. "No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) "..."

(b) "When traveling between the United States and any country or territory in North, Central, or South America or in any island adja-

Appendix A—Opinion Below

cent thereto: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto:

§ 53.8 "Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

On January 16, 1961 the Secretary of State, pursuant to the authority contained in Presidential Proclamation 3004, amended 22 C. F. R. § 53.3(b) (1958) by Department Regulation 108456, 26 F. R. 482 so as to provide:

§ 53.3(b) "When traveling between the United States and any country, territory or island adjacent thereto in North, Central or South America, excluding Cuba: . . .".

Simultaneously, Public Notice 179 was publicized,⁸ and the Department of State distributed Press Release No. 24⁹

⁸ It read:

"In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

"Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31,

Appendix A—Opinion Below

both of which promulgated more fully the purpose of the regulations and the administrative policy of the department in their application.

1938 (3 F. R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

"Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked." 26 Fed. Reg. 492.

⁹ It read:

"The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations." Press Release No. 24.

Appendix A—Opinion Below

The issues in this case are clearly distinguishable from *Kent v. Dulles, supra*. The Court there held that these two statutes, 8 U. S. C. § 1185 and 22 U. S. C. § 211(a), did not authorize the Secretary to withhold passports of citizens, because of their beliefs or associations; and that the employment of such a standard could not be used to restrain the citizen's right of free movement.

"We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent v. Dulles, supra*, at 128.

"The government *may* have the power to forbid the travel of all citizens to particular geographic areas because of war or national emergency. It does not have the power to restrain travel of citizens with whose politics it disagrees." Boudin (Plaintiff's counsel). *The Constitutional Right of Travel*, 56 Colum. L. Rev. 47, 74 (1956).

In the present case, Congress established by law the President's right to regulate and control passport visas within broad bounds of Executive discretion. There has been no claim of arbitrariness in the administration of these regulations. No passport has been claimed to have been denied, because of the applicant's personal beliefs, writings, character, race, religion, or the like. It does in fact bar the travel of all Americans to a specific geographical area. The mere fact that administratively all tourist travel is banned, while bona fide newspapermen and people with previous business interests in Cuba may be considered as

Appendix A—Opinion Below

eligible for travel is not an arbitrary criteria which would violate due process.

“... (J)udicial review even of the formula of selection is narrow and it is limited to determining whether the basis of the choice bears some rational relationship to the ends to be served. The distinction made between news agencies with a demonstrated interest in foreign news coverage and individual reporters must have some relevance to the purpose to be achieved. . . .

“The foreign policy considerations give the Secretary wide latitude in drawing a line and defining criteria.” *Frank v. Herter*, 269 F. 2d 245, 247-48 (D. C. Cir. 1959) (concurring opinion), *cert. denied*, 361 U. S. 918 (1959).¹⁰

The petitioner claims that if that power has been granted to the Executive pursuant to the law-making functions of Congress, the standards must be adequate to pass scrutiny by the accepted tests. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420-30 (1934).

“The legislature cannot delegate its power to make a law; but it can make a law to delegate a

¹⁰ It is significant to consider, in addition to the statutes in issue in the present case, the basic grant by Congress of power to the Secretary of State. 5 U. S. C. A. § 156: “The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.”

Appendix A—Opinion Below

power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.' " *Locke's Appeal*, 72 Penn. St. 491, 498, quoted in, *Field v. Clark*, 143 U. S. 649, 694 (1891).

"But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." *United States v. Grimaud*, 220 U. S. 506, 521 (1910).

To claim that Congressional statutes which authorize the Executive to make and administer regulations are not constitutional would destroy the theme of legislative action in multiple fields of accepted governmental regulation. The real test to be applied is whether or not the power delegated in this instance is under the circumstances, so vague, indefinite, and lacking in standards, as to constitute an unwarranted and illegal attempt to delegate to the Executive the Legislative power to make law.

The authority granted defined with general specificity the conditions under which the Executive was authorized to act. Both in time of war and upon the declaration by the President of a national emergency, when the President finds that the interests of the United States require, may these restrictions on travel departure and entry be imposed. The time or term of their application is limited until the President or Congress shall otherwise order. All of the conditions precedent established by law for the exercise of the power have been fulfilled.¹¹

Government is much like a clock mechanism; in order to perform its functions effectively it must operate. To do so

¹¹ See *supra*, note 7.

Appendix A—Opinion Below

in this area of passport administration, which is so inter-related with foreign affairs, considerable discretion and elbow-room must be granted to the Executive.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 324 (1936).

"It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke." *Report of the House Committee on Foreign Affairs*, H. R. Rep. No. 485, 65th Cong., 2d Sess. 2-3, quoted in *Kent v. Dulles*, *supra* at 133 (Clark, J., dissenting).

That part of the plaintiff's prayer for relief which requests that the criminal enforcement provisions of 8 U. S. C. § 1185(c) be enjoined is not warranted. The law complained of is not in contravention to the Federal Constitution. There are no grounds upon which this Court would be justified in interfering with the criminal enforcement aspects of this statute.

"The duty to enforce the criminal law is vested by the Constitution not in the judicial arm of the government but in the executive. . . . It would be an

Appendix A—Opinion Below

improvident trespass upon the separation of the powers, if not a complete usurpation of power, were the court to grant immunity in advance of an actual transaction." *International Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 212 Fed. Supp. 653, 656 (S. D. N. Y. 1963), *rev'd on other grounds*, Docket No. 28471, 2 Cir., Jan. 27, 1964.

"The court of equity has at times been called upon to enjoin the enforcement of a criminal prosecution. The rule has been firmly established that it will *not* ordinarily intervene to enjoin the enforcement of the law by the prosecuting officials . . . unless under proper circumstances there would be irreparable injury, and the sole question involved is one of law . . . where a clear legal right to the relief is established." *Reed v. Littleton*, 275 N. Y. 150, 9 N. E. 2d 814, 815-16 (1937).

Therefore, the plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted. So ordered.

T. EMMET CLARIE,
United States District Judge.

I concur in part and dissent in part, with opinion.

J. JOSEPH SMITH,
United States Circuit Judge.

I concur in part and dissent in part, with opinion.

M. JOSEPH BLUMENFELD,
United States District Judge.

February 20, 1964.

Appendix A—Opinion Below

SMITH, *Circuit Judge*, concurring in part, dissenting in part.

I agree with Judge Clarie that a three-judge court has jurisdiction, for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports. If § 211(a) of the Passport Act of 1926, 22 U. S. C. § 211(a) (1958), the sole statute cited in the regulations as a statutory basis, is construed at face value as a delegation of discretionary power to the Executive to impose restrictions on the issuance of passports to American citizens, it poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L. J. 171, 192 (1952).

However, I am unable to find in either § 211(a) of the Passport Act of 1926 or in § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185 (1958), any basis for the area restrictions in the regulations proclaimed by the State Department. Neither act was designed to meet the present problem. Section 211(a) is nearly identical with the original passport act, 11 Stat. 60 (1856), which was intended to preserve proper respect for American passports by centralizing their issuance in the Federal Government. A number of foreign governments had refused to recognize American passports that were being issued by local magistrates and officials. At that time no passport was necessary to travel abroad, and Congress hardly intended this statute to authorize the Executive to restrict travel. See Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 52-53 (1956); comment, *Passport Refusals for Political Reasons*, *supra*; Note, 41 CORN. L. Q. 282 (1956). See also, Assoc. of the Bar of the City of N. Y., *Freedom to Travel* 6-7 (1958). Section 215 of the Immigration and Nationality Act of 1952 was designed to control entry and

Appendix A—Opinion Below

exit over our borders in time of national emergency by preventing arrival or departure without a valid passport.

Since the right to travel is constitutionally protected, some clear grant of power to curtail it must exist before any infringement of the right to travel is upheld. As the Supreme Court put it in *Kent v. Dulles*, 357 U. S. 116, 129 (1957):

“Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than ‘request all whom it may concern to permit safely and freely to pass, and in the case of need to give all lawful aid and protection’ to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit . . . [T]he right of exit is a personal right included within the word ‘liberty’ as used in the Fifth Amendment. If that ‘liberty’ is to be regulated, it must be pursuant to the law making functions of Congress . . . And if that power is to be delegated, the standards must be adequate to pass scrutiny by the accepted tests.”

Where constitutional rights are restrained, *Kent v. Dulles* requires that we be reluctant to imply a broad grant of power by implication from statutes not clearly designed for the purpose. Hence the Supreme Court construed § 211 (a) and § 215 narrowly to grant the Executive the power to deny a passport on only two grounds: (1) Lack of proof

Appendix A—Opinion Below

of citizenship and allegiance to the United States and (2) the participation in illegal conduct. "We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, [211(a)] was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." 357 U. S. at 128. If the statutes are to be construed narrowly to preserve individual rights and to avoid constitutional doubts, they cannot be read as the majority read them as granting to the Secretary of State the power to restrict travel to certain foreign areas for any substantive reason he may choose.

Even if one adopts the view of the four dissenters in *Kent v. Dulles*—that the legislative history of the predecessors of § 215 and the administrative practice indicated Congressional intent to permit the Secretary of State to exercise his discretion to deny passports to those whose travel might endanger the internal security of the United States—there is no finding that travel to Cuba by Zemel or those similarly situated would endanger the internal security of the United States. Moreover, the language of § 215 says nothing about empowering the Secretary of State to restrict travel to certain foreign areas. Rather it says that no citizen shall attempt to enter or leave the United States in time of national emergency without a valid passport. It requires a truly remarkable feat of judicial gymnastics to construe this statute narrowly as a grant of power to invalidate passports for travel to certain countries. The regulations themselves did not purport to be based on § 215.

Appendix A—Opinion Below

I do not understand the majority to adopt the approach of the District of Columbia Court of Appeals in *Worthy v. Herter*, 270 F. 2d 905 (1959), cert. denied 361 U. S. 918 (1959), which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs. *Kent v. Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad. If such inherent power existed, what would be its bounds? Could travel to France be curtailed if the Executive decided that foreign policy required such curtailment to impose sanctions because of De Gaulle's recent recognition of Red China. If so, it is easy to see how "such executive power could, by increasing the number of nations to which travel is excluded while expanding the excepted class of persons for whom travel to such nations is permitted, approach the absolute discretionary control over travel held without warrant in the Constitution by the *Kent* decision". Note, 73 Harv. L. Rev. 1610, 1611 (1960).

But the majority seem to suggest that passport control is so intertwined with foreign affairs that Congress must have legislated the Executive "broad laneways of authority". Rather dubious support for this proposition is sought from 22 U. S. C. § 1732 (1958), which requires the President to take steps short of war to secure the release of Americans imprisoned abroad. Still, the entire approach flies in the teeth of the language of *Kent v. Dulles*—"Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them". 357 U. S. at 129.

We do not pass here on the desirability of area restrictions on travel. I should think Congress might well be justified in this period of international tensions produced by the Cold War in authorizing curtailment of travel to an actively unfriendly nation such as Cuba. It is entirely

Appendix A—Opinion Below

unrealistic to pretend that there was an end to emergency because of the Korean armistice. However, it is up to Congress to determine that conditions require a dilution of the freedom to travel through area restrictions on passports. See *Korematsu v. United States*, 323 U. S. 214 (1944), where the Supreme Court upheld the use of the war power to restrict the freedom of movement of citizens of Japanese origin after a Congressional determination of "the greatest imminent danger to the public safety". Cf. *Flynn v. Rusk*, 219 Supp. 709 (D. C. D. C. 1963); *Mayer v. Rusk*, 32 L. W. 2274 (D. C. D. C. 1963) (on appeal to the Supreme Court, Dkt. 746). The problem here is that as yet Congress has made no determination that there is an overriding need for area restrictions. After the Supreme Court's decision in *Kent v. Dulles*, President Eisenhower made a special request to Congress for legislation authorizing the Secretary of State, subject to substantive and procedural safeguards, to deny passports to persons whose travel would be inimical to the security or foreign relations of the United States and to impose restrictions on the use of passports by Americans for travel to areas where their presence might conflict with foreign policy objectives. Special Message of July 7, 1958, 104 Cong. Rec. 11849, 3 U. S. Code Cong. & Admin. News 5465, 85th Cong., 2nd Sess. (1958). While legislation making it unlawful for members of Communist organizations to be issued passports has been passed, none of the several bills introduced in recent years to authorize area restrictions on passports has been enacted. *E. g.*, H. R. 13318, 85th Cong., 2nd Sess.

I would hold that such legislation is necessary, for the regulations cannot be supported by the existing statutes, inherent executive power, or by any executive agreement. Even if we assumed that constitutional rights could be overridden by an executive agreement, the Managua Resolution of April 3, 1964 was not an executive agreement. The

Appendix A—Opinion Below

ministers of the seven nations present agreed only to recommend to their governments the adoption, "within the limitations of their respective constitutional provisions", the restriction and discouragement of the movement of their nationals to Cuba. Area restrictions may be necessary and desirable, but Congress should take the responsibility for authorizing them after a full fact-finding inquiry.

Therefore, I would hold that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority. I respectfully dissent from the denial of a declaratory judgment to that effect. I dissent not because I disapprove of the ends sought by the area restrictions imposed thus far, but because these restrictions are based on a claimed power whose limits are vague and undefined and whose source I cannot specify.

While I disagree, as indicated, with the view that the area restrictions are authorized, and would grant a declaratory judgment that they are not, I would dismiss the action as against the Attorney General as at best premature.

BLUMENFELD, District Judge, concurring in part, dissenting in part. I dissent on the ground that this is a case for a district court of one judge.

JURISDICTION

The plaintiff brings this action for an injunction to force the Secretary of State to validate his passport for travel to Cuba. The Secretary bases his refusal on existing State Department regulations.

We are confronted with a threshold question of jurisdiction. The question is whether this is a proper case for convening a three-judge court.

The recent per curiam opinion of the Supreme Court in *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715, 82

Appendix A—Opinion Below

S. Ct. 1294, 8 L. Ed. 2d 794 (1962), sets forth the tests which a district court should apply to determine whether a three-judge court is required:

“When an application for a statutory three-judge court is addressed to a district court, the court’s inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.”

There is no doubt that the constitutional question is not plainly insubstantial, see *Bailey v. Patterson*, 369 U. S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962), for in *Kent v. Dulles*, 357 U. S. 116, 130, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), the Supreme Court said: “To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect.” And, a basis for equitable relief is alleged.

But, the case does not “otherwise come[s] within the requirements of the three-judge statute,” which reads: Section 2282 of Title 28:

“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.”

Here, we are not directly and immediately confronted with the question whether either of the statutes, § 211a or § 1185, by their terms forbid granting to the plaintiff a

Appendix A—Opinion Below

passport validated for travel to Cuba. The plaintiff himself conceives that his position in this court is to "properly sue to protect his constitutional rights by alleging that the statute relied upon by the administrative agency does not support the action taken by it, and that if it does it is unconstitutional." Brief for Plaintiff, p. 5 (emphasis added).

This analysis is fairly derived from his specific prayer for relief:

"(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F. R. 492, and in Departmental Regulation 108.456, 26 F. R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, or by Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, or by Proclamation 3004, 18 F. R. 489." (Plaintiff's Amended Complaint, p. 7).

The Supreme Court in *Kent v. Dulles*, 357 U. S. at 129-30, treated § 1185(b) *pari passu* with § 211a, although the defendant expressly disclaims reliance upon it here as a source of authority for the regulation excluding travel to Cuba.

The focal point of the plaintiff's attack is clearly upon the regulation itself. "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of § 266. . . . In other words it [the plaintiff] seeks a restraint not

Appendix A—Opinion Below

of a statute, but of an executive action.”¹ *Phillips v. United States*, 312 U. S. 246, 252, 61 S. Ct. 480, 85 L. Ed. 800 (1941).

There is no logical escape from the proposition that whenever a regulation is held invalid it must mean either that the statute did not authorize the regulation or that the statute in so authorizing it is unconstitutional. In that event, the constitutional question is always reserved for secondary determination. The court's general doctrine of avoiding constitutional questions whenever possible, see *United States v. Rumely*, 345 U. S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953), is not without significance in determining whether the special three-judge court procedure should be invoked. The decision in *Phillips v. United States* that an attack upon a state statute was too remote to be cognizant for the procedural purposes of § 2281 tested by applying the principles set forth by Mr. Justice Cardozo in *Gully v. First Nat'l Bank*, 299 U. S. 109, 116-118, 57 S. Ct. 96, 81 L. Ed. 70 (1936), to differentiate between stages of adjudication at which issues are reached would seem to compel a like determination here. See *Kesler v. Dept. of Public Safety*, 369 U. S. 153, 158, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962).

We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations. But a regulation is not an “Act of Congress.” As *Jameson & Co. v. Morgenthau*, 307 U. S. 171, 173, 59 S. Ct. 804, 83 L. Ed. 1189 (1939), points out, § 2282 does not refer to “an order made by an administrative board or commission” as does § 2281 relating to action by states, but confines its requirement for a three-judge court “to cases of attack upon an ‘Act of Congress’ upon the ground that

¹ Section 266 is the predecessor of § 2881 and, although it deals with constitutionality of state statutes, it is fully applicable as in the respect here pertinent it in no way differs from § 2282.

Appendix A—Opinion Below

‘such Act or any part thereof is repugnant to the Constitution of the United States.’ ”

The fact that we deal with a constitutional right of a citizen does not mean that the validity of every claimed interference with it must be litigated before a three-judge court. A contrary conclusion is not compelled by a sentence in Mr. Justice Whittaker’s opinion in *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 76-7, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960), that a three-judge court is required whenever a substantial constitutional question is alleged.² The statutes identified by the plaintiff, § 211a and § 1185, present no more of an immediate clash between the Act and the Constitution here than they did in *Kent v. Dulles*, where the court in openly failing to reach the question of the constitutionality of the same statutes which the plaintiff claims are involved here, said:

“We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement” (357 U. S. at 130).

² That statement was made in a special context to refute a claim that a proper reading of § 2281 limits the requirement of a three-judge court to cases where the constitutional claim is the *sole* claim before the court. It would be in point here only if the defendant sought to defeat three-judge court jurisdiction on the ground that the plaintiff had destroyed pristine applicability of § 2282 by alternately raising the question whether the President had a right, apart from an Act of Congress, to impose area restrictions reasonably related to the control of foreign relations inherent in the President’s plenary power over foreign affairs.

Appendix A—Opinion Below

If the Supreme Court did not reach the question whether the same acts of Congress were repugnant to the Constitution in *Kent v. Dulles*, our exercise of jurisdiction as a three-judge court would be to permit the plaintiff in this case to wag the dog of a direct route to review by the Supreme Court simply by grasping the tail of a bare allegation of unconstitutionality of a statute and a prayer for an injunction.

Examination of *Flynn v. Rusk*, 219 F. Supp. 709 (D. D. C. 1963), appeal pending, in which a three-judge district court was convened, cited by the plaintiff, Brief for Plaintiff, p. 10, discloses a challenge to the constitutionality of the Subversives Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785 (1958), which on its face and in specific terms forbids any member of a communist organization to make application for or use or attempt to use a passport. In *Bauer v. Acheson*, 106 F. Supp. 445 (D. D. C. 1952), a case essentially the same as ours, upon which the plaintiff also relies, the misgivings of Circuit Judge Fahy over the lack of jurisdiction of a three-judge court led him to dissent, stating:

"In my view therefore the case is one for the usual district court composed of a single judge, with right in the parties to appeal from his decision to the Court of Appeals, followed by right of petition to the Supreme Court for review on writ of certiorari. This litigation should not be deemed within the special class of cases committed by Congress to a specially constituted three-judge court, properly convened only when a substantial question is raised as to the constitutionality of an Act of Congress the enforcement, operation or execution of which is sought to be enjoined, with right of direct appeal to the Supreme Court. 28 U. S. C. § 2282, *supra*. Plaintiff in the end seeks at most to enjoin action of the Secretary which might be invalid because not in conformity with the proper construction of the statute

Appendix A—Opinion Below

under which he acts. She raises, and there is involved, no substantial question as to the constitutionality of the statute.” (106 F. Supp. at 454) (Emphasis added).

That *Kent v. Dulles* was considered and decided on the merits by the Supreme Court without suggestion that a three-judge court should have been convened cannot be regarded as an omission by it to notice the route by which the case came before it, for as stated in *Kesler v. Dept. of Public Safety*, in Mr. Chief Justice Warren's dissenting opinion:

“The question is whether a three-judge court was properly convened for the trial of this case. Although the issue was not considered by the courts below, and has not been raised by the parties here, it is our duty to take independent notice of such matters and to vacate and remand any decree entered by an improperly constituted court.” (369 U. S. at 175).³

However the situation might be, if regarded solely on the authority of *Bauer v. Acheson*, we now know that the Supreme Court did not deem an action to enjoin the Secretary of State from refusing to grant a passport on the basis of regulations promulgated under § 211a to require the invocation of a three-judge court. Furthermore, in none of three separately considered appeals from summary judgments for the Secretary of State in cases not distinguishable from this one, rendered by a single judge district court after *Kent v. Dulles* was decided did the Court of Appeals

³ This portion of the dissenting opinion did not divide the justices, see 369 U. S. at 155, who rather focused on the question whether an immediate issue of constitutionality was presented. *Id.* at 157.

Appendix A—Opinion Below

for the District of Columbia Circuit⁴ make any suggestion that a three-judge court should have been convened. *Worthy v. Herter*, 270 F. 2d 905 (D. C. Cir.), cert. denied 361 U. S. 918 (1959); *Frank v. Herter*, 267 F. 2d 245 (D. C. Cir.), cert. denied 361 U. S. 918 (1959); *Porter v. Herter*, 278 F. 2d 280 (D. C. Cir. 1960), cert. denied 361 U. S. 918 (1959).

In my opinion, a three-judge court was improvidently invoked.

MERITS

I would deny plaintiff's motion for summary judgment and grant the Secretary of State's motion for summary judgment. For reasons which are set forth at the close of this opinion, I would dismiss the action against the Attorney General.

In the event it should hereafter be decided that this case should be determined by the action of a district judge, it is appropriate that I briefly express my views on the merits.

The statute, § 211a, has placed the authority to issue passports in the Secretary of State "under such rules as the President shall designate for and on behalf of the United States." One of those rules provides: "The Secretary of State is authorized in his discretion . . . to restrict it [a passport] against use in certain countries. . . ." 22 C. F. R. § 51.75 (1949). Under a claim of authority thus derived from § 211a, the Secretary imposed a restriction upon travel to Cuba on January 16, 1961, Public Notice

⁴ Six of the eight circuit judges who had sat *en banc* on *Kent v. Dulles*, sub. nom. *Briehl v. Dulles*, 248 F. 2d 561 (D. C. Cir. 1957), were equally distributed on three separate panels who upon review affirmed single judge district court determinations that state department regulations imposing area restrictions upon passports were valid.

Appendix A—Opinion Below

179. Plaintiff's contention that the purpose of § 211a was merely to centralize a ministerial duty to issue passports solely in the Secretary of State ignores the long standing view "that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." *Kent v. Dulles*, 357 U. S. at 124-25. While the Supreme Court held that the Secretary of State does not have "unbridled discretion to grant or withhold", *Id.* at 129, a passport, § 211a was not given such a restricted construction as that for which the plaintiff contends. When the Supreme Court in *Kent v. Dulles* rejected the Secretary's argument that long continued executive construction prior to the 1926 enactment of § 211a warranted the inference that he had discretion to deny a passport on the ground of personal beliefs and associations of a citizen, it pointed out that the scattered rulings affecting communists were insufficient and that the administrative practices which had "jelled" in two categories relating to allegiance and criminal activity were not relevant. But in rejecting the probative value of some and the relevancy of other prior administrative practices to establish that Congress had adopted an interpretation of discretion that embraced the right to deny a passport on the ground of beliefs of a citizen, the Supreme Court did not decide that the Secretary's discretion to deny passports was limited to only those categories which had jelled. The Court went no further than to "hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him *unbridled discretion* to grant or withhold a passport for *any* substantive reason he may choose." *Id.* at 128 (emphasis added). It was reiterating what it had already said about discretion: "But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." *Id.* at 125. The point of *Kent v. Dulles* is that the exercise of discretion

Appendix A—Opinion Below

by the Secretary is subject to judicial scrutiny. See also *Schachtman v. Dulles*, 225 F. 2d 938, 940 (D. C. Cir. 1955). Although the criteria for measuring the Secretary's discretion have not been determined other than that it may not be "unbridled", the fact that Congress gave it to the Executive indicates that it is to be exercised in relation to his powers to conduct foreign affairs. See *Schachtman v. Dulles*, 225 F. 2d at 941-42. It is plain to see that Congress was thinking primarily of the recognized power of the President to conduct foreign affairs when through § 211a it placed the exclusive authority to issue passports in the *Secretary of State*, the arm of the President in conducting foreign affairs, under "such rules as the President shall designate and prescribe for and on behalf of the United States, . . ." (Emphasis added). Travel to other nations is at least one facet of foreign affairs.

Plaintiff's claim that § 211a is an unconstitutional delegation of power has no merit. The role of delegation is governed not only by the conditions surrounding the particular problem in this case, but by general premises underlying the conduct of foreign affairs, the critical phases of which have always been entrusted to the President and his Secretary of State. The scope and pace of foreign affairs in the condition of the world today would make it impossible for Congress to act without delegation. Where, as here, Congress seeks to implement presidential power, standards other than a reasonable connection to the conduct of foreign affairs are not necessary to constitutionality of the delegating act. *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948); See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936). There is no need to consider whether it would fall within the scope of the President's inherent powers. But see *Worthy v. Herter*.

Appendix A—Opinion Below

Although passports are sometimes the subject matter of treaties with other nations, the treaty power may include the power to exclude aliens but not the power to impose travel restrictions upon our own citizens. Treaty powers cannot be used to regulate matters which are purely of domestic concern. See *Power Authority of New York v. FPC*, 247 F. 2d 538 (D. C. Cir.), remanded with direction to dismiss as moot, 355 U. S. 64 (1957).

The question then is whether the Secretary of State through the exercise of the discretion vested in him by the President pursuant to the power delegated by Congress in § 211a may restrict travel to a country with which the United States has broken off diplomatic relations.

The conduct of our relations with other nations is the primary responsibility of the President. *United States v. Curtiss-Wright Export Corp.* In particular, the President has the exclusive power to determine whether to recognize a foreign government and whether to initiate and maintain diplomatic relations. *United States v. Pink*, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). This is not a case like *Kent v. Dulles*, where the passports were denied to certain citizens because of their beliefs and associations. Rather it designates certain parts of the world forbidden to all American travelers. This can hardly be regarded as arbitrary or capricious by this plaintiff. Cf. *Perkins v. Elg*, 307 U. S. 325, 350, 59 S. Ct. 884, 83 L. Ed. 1320 (1939). It relates not to internal security, but to foreign affairs.

The refusal to validate plaintiff's passport for travel to Cuba relates to an exercise of the power to conduct foreign affairs which the Chief Executive already has and is well within the discretion given to the Secretary by the President. The amply sufficient reasons published by the Secretary for the promulgation of the regulation which curtails the plaintiff's right to travel to Cuba were starkly emphasized when this government confronted the Soviet Union with a demand to remove the missiles it had pre-

Appendix A—Opinion Below

viously brought to Cuba only a few weeks before Zemel began this suit.

I am not inhibited in reaching this result by constitutional considerations, for I believe that the restriction on the right to travel that is involved here in a valid one. "The gravest imminent danger to the public safety" is required in order to justify the exclusion of persons from their homes, *Korematsu v. United States*, 323 U. S. 214, 218, 65 S. Ct. 193, 89 L. Ed. 194 (1944), and perhaps a similar showing must be made in order to justify the confinement of a citizen within the boundaries of this country. *Kent v. Dulles*, 357 U. S. at 128. But the right to travel is properly subject to a reasonable prohibition on travel to a particular foreign country which our government believes to be so unfriendly to this nation as to require the severance of diplomatic relations with it. I do not regard the plaintiff's right to see for himself what was happening in Cuba to be of so exalted a nature that it cannot be subjected to restraint during a period when the State Department predicts that such travel might provoke international incidents which would necessitate negotiations, see 22 U. S. C. § 1732 (1958), with a government whose existence the United States is committed to ignore.

It remains to consider plaintiff's claim that § 1185 does not authorize prosecution for violation of an area restriction contained in a passport. Apart from the fact that the Secretary expressly disclaims reliance upon it, that statute is concerned solely with the imposition of sanctions for passport violations, and does not undertake to create passport disqualification limitations. *Briehl v. Dulles*, 248 F. 2d 561, 581 (D. C. Cir. 1957) (Bazelon, J. dissenting), rev'd sub. nom. *Kent v. Dulles*, 359 U. S. 116 (1958). Since the area restriction in question is a reasonable regulation of the plaintiff's right to travel, the plaintiff's only interest in having the statute construed is to determine whether he may violate a valid restriction without risking the sanc-

Appendix A—Opinion Below

tions which § 1185 imposes for entry or departure from the United States contrary to its provisions. This is not a sufficient interest to require a construction of § 1185 before it is raised in a criminal proceeding. *Pauling v. Eastland*, 288 F. 2d 126 (D. C. Cir.), cert. denied, 364 U. S. 900 (1960); See *ILA v. Seatrain Lines, Inc.*, 212 F. Supp. 653 (S. D. N. Y. 1963), rev'd on other grounds, Docket No. 28471, 2 Cir., Jan. 27, 1964.

APPENDIX B

Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL,

Plaintiff,

vs.

DEAN RUSK, Secretary of State, Department of State, and
ROBERT F. KENNEDY, Attorney General,
Defendants.

The above-entitled case having come on to be heard before a three-judge District Court pursuant to the provisions of 28 U. S. C. §§ 2282 and 2284, with all parties appearing by counsel, and the issues having been duly considered and determined by the said Court in its "Memorandum of Decision" filed on February 21, 1964,

It is ACCORDINGLY ORDERED, ADJUDGED and DECREED, as follows:

(1) That the motion for summary judgment filed by plaintiff be and is hereby denied;

(2) That the motion for summary judgment filed by Dean Rusk, Secretary of State, be and is hereby granted;

(3) That judgment be and is hereby entered dismissing the action on the merits as against Robert F. Kennedy, Attorney General; and,

(4) That the defendants have and recover from plaintiff their costs in the action.

Dated at New Haven, Connecticut, this 2nd day of March, 1964.

GILBERT C. EARL,
Clerk, United States District Court.

APPENDIX C

Statutes, Proclamations, Executive Orders and Regulations

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. § 211a provides, in pertinent part, as follows:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both: and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

**REVOCATION OF PROCLAMATION AS
AFFECTING PENALTIES**

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this sec-

Appendix C—Statutes, Proclamations, Executive Orders and Regulations

tion shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

3. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F. R. 799 as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

4. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

5. The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 444, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states; and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby

**Appendix C—Statutes, Proclamations, Executive Orders
and Regulations**

find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

6. The pertinent portions of the regulations issued by the Secretary of State as found in Part 53 of Title 22 of the Code of Federal Regulations are:

“Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

American Citizens and Nationals

§ 53.1 *Definition of the term ‘United States’.* The term ‘United States’ as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to

*Appendix C—Statutes, Proclamations, Executive Orders
and Regulations*

the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part; if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: And provided also, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: Provided, That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is \$25.

**Appendix C—Statutes, Proclamations, Executive Orders
and Regulations**

*§ 53.5 Prevention of departure from or entry into
the United States. . . .*

*§ 53.6 Attempt of a citizen or national to enter
without a valid passport. . . .*

*§ 53.8 Discretionary exercise of authority in
passport matters.* Nothing in this part shall be
construed to prevent the Secretary of State from
exercising the discretion resting in him to refuse
to issue a passport, to restrict its use to certain
countries, to withdraw or cancel a passport already
issued, or to withdraw a passport for the purpose
of restricting its validity or use in certain countries.

7. Public Notice 179, 26 F.R. 492, promulgated on Jan-
uary 16, 1961 provides:

"DEPARTMENT OF STATE
[Public Notice 179]

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and
in the absence of diplomatic relations between that
country and the United States of America I find
that the unrestricted travel by United States citi-
zens to or in Cuba would be contrary to the foreign
policy of the United States and would be otherwise
inimical to the national interest.

Therefore pursuant to the authority vested in
me by Sections 124 and 126 of Executive Order No.
7856, issued on March 31, 1938 (3 F.R. 681, 687, 22
CFR 51.75 and 51.77) under authority of Section 1
of the Act of Congress approved July 3, 1962 (44
Stat. 887, 22 U.S.C. 211a), all United States pass-
ports are hereby declared to be invalid for travel
to or in Cuba except the passports of United States
citizens now in Cuba. Upon departure of such citi-
zens from Cuba their passports shall be subject to
this order.

**Appendix C—Statutes, Proclamations, Executive Orders
and Regulations**

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration

8. Press Release No. 24 issued by the Secretary of State on January 16, 1961 provides:

PRESS RELEASE NO. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba; United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

INDEX

Jurisdiction-----	1
Questions presented-----	2
Statutes and regulations involved-----	2
Statement-----	2
Argument-----	5
Conclusion-----	11
Appendix-----	13

CITATIONS

Cases:

Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103-----	8
Flemming v. Nestor, 363 U.S. 603-----	7
Frank v. Herter, 269 F. 2d 245, certiorari denied, 361 U.S. 918-----	10
International Ladies' Garment Workers Union v. Donnelly, 304 U.S. 243-----	7
Kent v. Dulles, 357 U.S. 116-----	10
Peru, Ex parte, 318 U.S. 578-----	8
Porter v. Herter, 278 F. 2d 280, certiorari denied, 361 U.S. 918-----	10
Rorick v. Board of Commissioners, 307 U.S. 208-----	7
Thompson v. Whittier, 365 U.S. 465-----	7
United States v. Belmont, 301 U.S. 324-----	8
United States v. Curtiss-Wright Corp., 299 U.S. 304-----	9
United States v. Pink, 315 U.S. 203-----	8
William Jameson & Co. v. Morgenthau, 307 U.S. 171-----	7
Worthy v. Herter, 270 F. 2d 905, certiorari denied, 361 U.S. 918-----	10

II

Statutes and proclamations:

	Page
Immigration and Nationality Act of 1952, Section 215, 66 Stat. 190, 8 U.S.C. 1185-----	2, 4, 6, 9, 13
Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a-----	2, 4, 6, 7, 8, 13
Presidential Proclamation No. 2914, De- cember 16, 1950, 64 Stat. A454-----	9, 14
Presidential Proclamation No. 3004, Jan- uary 17, 1953, 67 Stat. C31-----	9, 15
22 U.S.C. 1732-----	10
28 U.S.C. 2282-----	2, 6, 7, 13

Miscellaneous:

Bishop, <i>International Law</i> (1953)-----	8
Borchard, <i>Diplomatic Protection of Citi- zens Abroad</i> (1915)-----	8
Executive Order 7856, 3 F.R. 687, 22 C.F.R. 51.75-----	2, 8, 14
2 Hyde, <i>International Law</i> (1922)-----	8
2 Lauterpacht-Oppenheim, <i>International Law</i> (7th ed. 1952)-----	8
State Department Press Release No. 24 (January 16, 1961)-----	2, 3, 19
State Department Public Notice 179 (Jan- uary 16, 1961), 26 F.R. 492-----	2, 3-4, 18

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1115

LOUIS ZEMEL, APPELLANT

v.

**DEAN RUSK, SECRETARY OF STATE, AND ROBERT F.
KENNEDY, ATTORNEY GENERAL**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT**

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(a) and 1(c), of the Revised Rules of this Court, appellees move that this appeal be dismissed or, alternatively, that the judgment of the district court be affirmed.

JURISDICTION

This is a direct appeal from a final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2282. The judgment of the district court was entered on March 2, 1964 (J.S. 42a), and the notice of appeal was filed on March 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the relief requested by appellant required the convening of a three-judge court under 28 U.S.C. 2282.

2. Whether the Secretary of State is authorized by statute to restrict the travel of United States citizens to Cuba by issuing passports which are invalid for that country.

3. Whether geographical passport restrictions which are enforced by criminal sanctions violate the First, Fifth, Ninth or Tenth Amendments of the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

The statutes involved (28 U.S.C. 2282; 22 U.S.C. 211a; 8 U.S.C. 1185) are set out in the Appendix, pp. 13-14, *infra*. The proclamations, executive orders and regulations involved are also set out in the Appendix, pp. 14-19, *infra*.

STATEMENT

On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. Subsequently, acting under the authority of the Passport Act of 1926 (22 U.S.C. 211a) and Executive Order 7856 (3 F.R. 681, 687), the Department of State on January 16, 1961, issued Public Notice 179 (26 F.R. 492), which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A companion press release (Press Release No. 24)

stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests."

Appellant, a citizen of the United States and holder of a valid passport, applied to the Secretary of State on March 31, 1962, to have his passport validated for travel to Cuba as a tourist (R. 45).¹ The request was denied (R. 46). On October 30, 1962, appellant renewed his request, stating that "the purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen" (R. 54). The renewed request was also denied on the ground that the purpose of appellant's trip did not meet the standards prescribed for such travel in the applicable press release (R. 55).

On December 7, 1962, appellant instituted this action in the United States District Court for the District of Connecticut. In his original and amended complaints he alleged that the Secretary of State's regulation restricting travel to Cuba was unauthorized by statute and deprived appellant of constitutional rights under the First, Fifth, Ninth and Tenth Amendments of the United States Constitution. The prayer for relief sought a judgment declaring (1) that appellant was constitutionally entitled to travel to Cuba, (2) that appellant's travel to Cuba would not violate any statutes, regulations, or passport restrictions, (3) that the Secretary of State's regulation

¹ "R." refers to the record certified by the clerk of the lower court to the Supreme Court.

4

restricting travel to Cuba was invalid, (4) that the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 were unconstitutional, (5)² that the Secretary of State's refusal to grant appellant a passport valid for travel to Cuba violated appellant's constitutional rights and rights granted by the United Nations Declaration of Human Rights, and (6) that denial of the passport endorsement without a formal hearing violated appellant's rights under the Fifth Amendment.² The complaint also requested that the Secretary of State be directed to validate appellant's passport for travel to Cuba and that the appellees be enjoined from interfering with such travel. In the amended complaint, appellant also added to the paragraph which sought a declaration of unconstitutionality regarding the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 a prayer that the appellees be enjoined "from carrying out or enforcing the said statutes, as aforesaid."

On appellant's motion, and over the objection of the appellees, a three-judge court was convened. On cross-motions for summary judgment, the court, by a divided vote, granted the Secretary of State's motion for summary judgment and dismissed the action against the Attorney General "on the merits" (J.S. 42a). One of the members of the three-judge panel, District Judge Blumenfeld, was of the view that the case was not one for a three-judge court because, as

² This procedural claim was expressly abandoned in the district court (J.S. 3a) and has not been urged here.

he said, "We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations" (J.S. 32a). On the merits, Judges Clarie and Blumenfeld sustained the validity of the regulation. Circuit Judge Smith concurred with Judge Clarie's conclusion that the case was one for a three-judge court but dissented on the merits. His ground was "that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority" (J.S. 29a).

ARGUMENT

We believe that there is no substantial doubt as to the constitutional and statutory validity of the Secretary of State's restriction on travel by American citizens to Cuba, and that the statutory as well as the constitutional issues in this case—which were presented on petitions for certiorari to this Court several terms ago in a series of cases arising in the District of Columbia Circuit—do not require plenary consideration. However, we are also of the opinion that the decision to convene a three-judge court was erroneous and that the case should have been heard and decided by a single district judge with appeal being to the United States Court of Appeals for the Second Circuit. Hence we submit that it would be appropriate to dismiss the present appeal on the ground that the case is not within the appellate jurisdiction of this Court.

1. Section 2282 of Title 28 of the United States Code provides that a three-judge court be impaneled in any case in which the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *." This is obviously not such a case. The injunctive relief sought by appellant was directed against administrative action which may have been permitted, but was surely not compelled or directed, by an Act of Congress. In addition to the declaratory relief requested, appellant sought only (1) to enjoin the appellees from interfering with his proposed trip to Cuba and (2) to compel the Secretary of State to issue the requested passport endorsement. Neither of these remedies, if granted, would have constituted restraint of the "enforcement, operation or execution of any Act of Congress." Nor does appellant's demand that the appellees be enjoined "from carrying out or enforcing" the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 convert the suit into one which must be heard by a three-judge court. This demand cannot be taken literally; for if it were granted as requested its effect would be to prohibit the issuance of *any* passport. The challenged provision of the Passport Act of 1926 states that the Secretary of State "may grant and issue passports" under certain conditions. An order enjoining the enforcement, operation or execution of this statute would be directly contrary to appellant's prayer that he be

permitted to travel to Cuba since it would bar the issuance of all passports, including the endorsement sought by appellant.

Appellant's real constitutional challenge is, as Judge Blumenfeld observed in the district court, to the regulations adopted by the President and the Secretary of State pursuant to the enabling clauses of the Acts of Congress. Consequently, the jurisdictional issue in this case is controlled by *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, in which, as in this case, the appellant's claim was that certain regulations adopted and administrative action taken under an Act of Congress were unconstitutional. This Court dismissed the appeal from a judgment entered by a three-judge court and remanded the case to the district court for the entry of a new judgment which could be appealed to a court of appeals. We submit that that course, which was also followed in *Rorick v. Board of Commissioners*, 307 U.S. 208, 213, and in *International Ladies' Garment Workers Union v. Donnelly*, 304 U.S. 243, 251-252, would preserve appellant's right to appeal from the adverse judgment and would be most consistent with the accepted construction of 28 U.S.C. 2282. See also *Thompson v. Whittier*, 365 U.S. 465; cf. *Flemming v. Nestor*, 363 U.S. 603, 606-608.

2. Should the Court conclude, however, that the case is properly here on appeal, the judgment below could be affirmed summarily since appellant's contentions do not merit plenary consideration. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, empowered the Secretary of State to issue passports

"under such rules as the President shall designate and prescribe for and on behalf of the United States."

The President's current regulations pursuant to this statute appear at 22 C.F.R. Part 51, and were issued in 1938 as Executive Order No. 7856 (3 F.R. 687). 22 C.F.R. 51.75 provides as follows (see p. 14, *infra*):

The Secretary of State is authorized in his discretion to refuse to issue a passport, to *restrict a passport for use only in certain countries*, to restrict it against use in certain countries; to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries. [Emphasis added.]

This delegation of power from the President to the Secretary of State to enumerate those countries in which a passport is to be invalid was a recognition of the well-established principle of international relations that suspension of travel in a foreign country is an instrument of foreign policy. See Bishop, *International Law* (1953), p. 559; 2 Hyde, *International Law* (1922), pp. 169-172; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 445-446; 2 Lauterpacht-Oppenheim, *International Law* (7th ed. 1952), pp. 134-144. In enacting the Passport Act of 1926, Congress must have been aware of the broad leeway traditionally reserved for Executive discretion in this area and of the limited function of judicial review over decisions based on considerations of foreign policy. See *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103; *United States v. Pink*, 315 U.S. 203; *Ex parte Peru*, 318 U.S. 578; *United States v.*

Belmont, 301 U.S. 324; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304. Hence, while the Act did not expressly provide for geographical passport restrictions, the delegation of power to the President to prescribe "rules" for the issuance of passports must have contemplated precisely this sort of limitation, even though its effect at the time would not have been—as it is today—to prohibit travel to countries for which a passport is invalid.

Moreover, in the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, Congress authorized the imposition of "restrictions and prohibitions" on the departure and entry of citizens in times of national emergency and provided criminal sanctions for the enforcement of such restrictions. Having declared a national emergency in 1950 (Presidential Proclamation No. 2914), the President empowered the Secretary of State to impose geographical passport limitations under the 1952 Act (Presidential Proclamation No. 3004). These proclamations are still in effect, and the Secretary of State's reliance upon the Immigration and Nationality Act of 1952 as a basis for his restriction of travel to Cuba indicates that this regulation is based upon the still-existing national emergency. We submit, therefore, that appellant's contention that area restrictions are unauthorized by the applicable statutes is totally without merit.

3. Appellant's constitutional challenge is equally unsound. Similar constitutional arguments were made several years ago in a series of cases considered by the Court of Appeals for the District of Columbia

Circuit and were unanimously rejected by that court. They were then presented to this Court in petitions for certiorari, and certiorari was denied. *Worthy v. Herter*, 270 F. 2d 905, certiorari denied, 361 U.S. 918; *Frank v. Herter*, 269 F. 2d 245, certiorari denied, 361 U.S. 918; *Porter v. Herter*, 278 F. 2d 280, certiorari denied, 361 U.S. 918.

The constitutional issues here are obviously distinguishable from those in a case like *Kent v. Dulles*, 357 U.S. 116. In *Kent* the central issue was whether the petitioner could be distinguished from other citizens and denied a passport—and thereby deprived of the right to travel to countries for which a passport is required—because of his particular “beliefs or associations.” 357 U.S. at 130. Appellant in this case has not been singled out or deprived of rights which other citizens are granted. The restriction on travel to Cuba is non-discriminatory, and any citizen whose purpose in traveling to that country meets the specified criteria qualifies for an exception. And whatever First Amendment rights may be involved in foreign travel surely do not confer on American citizens an unqualified right to interfere with validly adopted foreign policy by traveling to countries where the Department of State has determined that travel should be restricted and where their safety and liberty may be endangered. See the opinion of the court of appeals in *Worthy v. Herter*, *supra*, 270 F. 2d at 909-912. This is particularly true in light of the statutory obligation imposed on the President by 22 U.S.C. 1732, which requires him to take appropriate

action to protect Americans "unjustly deprived of [their] liberty by or under the authority of any foreign government."

CONCLUSION

For the foregoing reasons, either this appeal should be dismissed or the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

JUNE 1964.

APPENDIX

28 U.S.C. 2282 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

22 U.S.C. § 211a (44 Stat. 887) provides:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

8 U.S.C. 1185 (66 Stat. 190) provides, in pertinent part:

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure

of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * * * *

(b) Citizens. After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Executive Order No. 7856, March 31, 1938, 3 F.R. 687, 22 C.F.R. 51.75, provides in pertinent part:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, provides, in pertinent part:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, provides, in pertinent part:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the de-

departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone,

and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, includ-

ing the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

Public Notice 179, 26 F.R. 492 (January 16, 1961), provides:

DEPARTMENT OF STATE
[Public Notice 179]

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the

authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961.

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration.

Press Release No. 24 (January 16, 1961) provides:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

**DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.**

**APPELLANT'S BRIEF IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM**

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INDEX

	PAGE
ARGUMENT	1
APPENDIX	6

CITATIONS:

Allen v. Grand Central Aircraft Co., 347 U. S. 535	3
Aptheker v. The Secretary of State, Oct. Term 1963, No. 461, 32 L. W. 4611	4, 5
Bauer v. Acheson, 106 F. Supp. 445 (D. C. Cir., 1952)	4
Fleming v. Nestor, 363 U. S. 603	3
Florida Lime Growers Inc. v. Jacobsen, 362 U. S. 73	4
Idlewild Liquor Corp. v. Epstein, 370 U. S. 713 ..	3
Kennedy v. Mendoza-Martinez, 372 U. S. 144	3
Kent v. Dulles, 357 U. S. 116	4, 5
Lee v. Bickell, 292 U. S. 415	4
Rusk v. Cort, 372 U. S. 144	4
Sterling v. Constantin, 287 U. S. 378	4
William Jameson & Co. v. Morgenthau, 307 U. S. 171	4
Worthy v. United States, 328 F. 2d 386 (C. A. 5, 1964)	4

STATUTES:

Immigration and Nationality Act of 1952, Section 215, 66 Stat. 163, 8 U. S. C. 1185	2, 3, 4
Passport Act of 1926, 44 Stat. 887, 22 U. S. C. Sec. 211(a)	2, 4
28 U. S. C. 2282, 62 Stat. 968	3

IN THE
Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F. KENNEDY,
Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

**APPELLANT'S BRIEF IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM**

The Jurisdictional Statement herein, while complying with Rule 15(1)(b)(iv) (Jur. St. p. 2)¹ did not include the three-judge court issue among the "Questions Presented" in view of the disposition of the matter by the court below. Appellees' motion compels fuller treatment.

1. The amended complaint (herein called the complaint) challenged appellees' passport restrictions upon appellant's travel and appellees' threats of criminal prosecution on

¹ "Jur. St." refers to the Jurisdictional Statement; "Motion" refers to the appellees' Motion to Dismiss or Affirm; "R." refers to the record certified by the clerk of the lower court to the Supreme Court; "Comp." refers to the amended complaint.

two independent grounds; (1) they were unauthorized by statute, and (2) the Passport Act of 1926 (herein called the "Passport Act") and § 215 of the Immigration and Nationality Act of 1952 (herein called § 215) relied upon by appellees,

"are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph "14(c)"; and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power." (Comp. ¶ 15, *infra*, p. 10)²

Appellant therefore sought judgment decreeing, *inter alia*, "that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes as aforesaid" (*infra*, p. 11).

Appellees answered that both statutes authorized the Secretary's regulations, violation of which was punishable under Section 215 (Answer, ¶¶ 9 and 10, R. 22-23). The answer denied that the two statutes were unconstitutional (Answer, ¶¶ 14-16, R. 23).

Two members of the court below held that the statutes authorized the restrictions upon appellant's travel (Jur. St. pp. 1a-23a, 29a-41a). Circuit Judge Smith, dissenting on the merits, agreed that a three-judge court had jurisdiction "for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports" (Jur. St. p. 24a). He urged, however, that if the Passport Act were construed to authorize the Secretary's regulations, it created a problem "of invalid delegation" (*ibid.*) and concluded that neither the Passport

² A copy of the complaint is set forth in the Appendix to this brief.

Act nor § 215 afforded "any basis for the area restrictions" (*ibid.*).

2. The court below correctly held that a three-judge court was necessary, since "the constitutional question raised is substantial * * * the complaint at least formally alleges a basis for equitable relief, and * * * the case presented otherwise comes within the requirements of the three-judge statute", *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715. In view of the injunctive relief sought it cannot be said here, as in *Flemming v. Nestor*, 363 U. S. 603, 607, that the action "did not seek affirmatively to interdict the operation of a statutory scheme".³ A judgment for appellant would necessarily "put the operation of a federal statute under the restraint of an equity decree" (*ibid.*). As the court below said, it "would open up an immediate thoroughfare for unrestricted travel between the United States and Cuba" (Jur. St. p. 6a).

Since the issue of the constitutionality of the statutes was framed and litigated by the parties, it cannot be said that appellant's "real constitutional challenge is * * * to the regulations" (Motion, p. 7). A suitor who challenges the validity of a statute relied upon by the Government to authorize regulatory action properly sues under 28 U. S. C. 2282, even where, alternatively, he argues that the statute does not authorize the regulations, or that the latter are otherwise invalid. This is precisely what occurred in *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541, 553,

³ This is the distinction recognized by the Solicitor General in his brief in *Kent v. Dulles*, *infra*, when he noted that the petitioners there "did not challenge the constitutionality of the statutes themselves in their complaints" and that had they done so, "a problem as to convening a three-judge court district court would have arisen", *Kent v. Dulles*, O. T. 1957, No. 481 (Respondent's Brief, pp. 91-92, fn. 98). The distinction between *Rusk v. Cort*, 372 U. S. 144 (three-judge court) and *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 is that in the latter case "the issues were framed so as not to contemplate any injunctive relief". (*Id.* at 153).

where a three-judge court heard a complaint that certain regulations "are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution". See also *Rusk v. Cort*, 372 U. S. 144,⁴ *Bauer v. Acheson*, 106 F. Supp. 445 (D.C. Cir. 1952). See also *Lee v. Bickell*, 292 U. S. 415, 417, 425; *Florida Lime Growers Inc. v. Jacobsen*, 362 U. S. 73, 77, 80-81, 85; *Sterling v. Constantin*, 287 U. S. 378, 393, 394.

Appellees' principal reliance is upon *William Jameson & Co. v. Morgenthau*, 307 U. S. 171. That case held that "no substantial question of constitutional validity was raised" with respect to the statute there involved (*id.* at 173).⁵ That cannot be said of the instant lawsuit in the light of this Court's recent decisions on freedom of movement, *infra*, page 5. It is this critical point that distinguishes the *William Jameson* case from the instant one.

The suggestion that an injunction in this case would "prohibit the issuance of any passport" by the Secretary is obviously incorrect (Motion, p. 6). An injunction against the Passport Act or § 215 would merely prevent their restriction of travel to particular areas⁶ and would not interfere in any way with the Secretary's inherent power to issue a passport. See *Bauer v. Acheson*, 106 F. Supp. 445 (D. C. Cir. 1952).

3. Appellees' suggestion that the judgment below "could be affirmed summarily" (Motion, p. 7) conflicts with this Court's recent decisions upholding the constitutional right to travel. *Kent v. Dulles*, 357 U. S. 16, 127; *Aptheker v. The Secretary of State*, Oct. Term 1963, No. 461, 32 L. W. 4611. This Court has never agreed with the view that the

⁴ See e.g. par. 19 of the complaint (p. 4 of the Transcript of Record) in the *Cort* case.

⁵ See *Worthy v. United States*, 328 F. 2d 386 (C. A. 5, 1964), as an example of the nullification as unconstitutional of another aspect of § 215.

liberty of the citizen may be manipulated as "an instrument of foreign policy" (Motion; p. 8). The cases cited by appellees do not involve such issues of personal liberty; the same authorities were disregarded by this Court when relied upon by the Government in the *Kent* and *Aptheker* cases.

In addition to the constitutionality of the statutes, this case presents substantial questions as to their construction, appellees' claim of inherent Executive power, and the viability of decade-old emergency proclamations. The treatment of these issues in the court below attests to their substantiality. In the light of their continuing importance and the diversity of views expressed below, it is desirable that an authoritative ruling be made by this Court.

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APPENDIX**Amended Complaint for Declaratory Judgment
and Injunction****UNITED STATES DISTRICT COURT****DISTRICT OF CONNECTICUT****Civil Action No. 9549**

LOUIS ZEMEL, Powder Hill Road, Middlefield, Connecticut,
Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State,
Washington, D. C. and **ROBERT F. KENNEDY**, Attorney
General, Washington, D. C.,
Defendants.

The plaintiff, Louis Zemel, by his attorneys, complaining of the defendants, Dean Rusk, Secretary of State, and Robert F. Kennedy, Attorney General, alleges as follows:

1. The Court has jurisdiction of this action under Section 10 of the Administrative Procedure Act, 5 U. S. C. Section 1009; and under Title 28 U. S. C. Sections 1391 and 2201. One of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U. S. C. Sections 2282 and 2284.

2. Plaintiff is a citizen of the United States, residing in Middlefield, Connecticut.

*Amended Complaint for Declaratory Judgment
and Injunction*

3. The defendant, Dean Rusk, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

4. The defendant, Robert F. Kennedy, is Attorney General of the United States and is charged by law with the duty of regulating departure from and entry into the United States.

5. Plaintiff is the holder of a valid United States passport of standard form and duration.

6. On January 16, 1961, the defendant Secretary of State announced publicly and formally ruled that United States passports are invalid for travel to Cuba unless such passports are specifically endorsed by him for such travel. The said announcement was made in Press Release No. 24 of the Department of State.

7. On January 16, 1961, the defendant Secretary of State, through his Deputy Under-Secretary for Administration, issued Public Notice 179, 26 F. R. 492 (January 19, 1961), which stated that "all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba" and "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked."

8. On January 16, 1961, the defendant Secretary of State issued Departmental Regulation 108.456, which was published on January 19, 1961 (26 F. R. 482-483), which amended 22 CFR 53.3(b), and which exempted Cuba from those countries in the Western Hemisphere for which a passport is not required of United States citizens by the defendant Secretary of State.

*Amended Complaint for Declaratory Judgment
and Injunction*

9. The said restrictions upon travel to Cuba are purportedly based upon the President's powers under (i) Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185 (ii), the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. 211a (iii), Sections 124 and 126 of Executive Order 7856, 3 F. R. 681, 687, 22 CFR 51.75, 51.77 and (iv) Proclamation 3004, 18 F. R. 489 issued on January 17, 1953, the said Proclamation being based upon the alleged existence of a national emergency arising principally from the Korean War. In addition, the defendant Secretary of State has claimed the existence of an "inherent executive power" to restrict and prevent such travel.

10. Upon information and belief, the defendant Secretary of State has publicly announced and privately advised individuals that criminal proceedings against United States citizens traveling to Cuba and not possessing the said endorsements in their passports would be instituted. In at least one such case, the defendant Attorney General recently instituted a criminal prosecution against an American citizen on the ground that his entry into the United States from Cuba without a passport validated as set forth above constitutes a violation of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185.

11. Upon information and belief, the restrictions and sanctions set forth in paragraphs "9" and "10" above have caused common carriers to refuse to carry United States citizens not bearing United States passports with the the special endorsement referred to in paragraph "7" above, and have caused foreign governments to refuse to permit the departure of American citizens from their territories for Cuba under similar circumstances.

*Amended Complaint for Declaratory Judgment
and Injunction*

12. On March 31, 1962 and thereafter, the plaintiff requested the defendant Secretary of State to validate his passport for travel to Cuba. Such requests were rejected by defendant on April 18, 1962 and thereafter.

13. On May 1, 1962, the plaintiff requested that the defendant Secretary of State give him a hearing in connection with the said defendant's refusal to validate plaintiff's passport for travel to Cuba. On May 9, 1962, the said defendant, citing 22 CFR 51.170 advised the plaintiff that the State Department's hearing procedures were not available in cases of this kind.

14. The actions of the defendants in this case are unlawful in that:

(a) The Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, does not authorize the defendants to prevent by denial of passport facilities or by threat of civil or criminal sanctions or otherwise, the travel of an American citizen to, or in any part of the world.

(b) Section 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1185, does not authorize the defendants to prohibit the travel of United States citizens to or in countries specified by the said defendants or make illegal the departure from the United States to any country whatsoever of American citizens bearing valid passports.

(c) The denial of the right to travel is an interference with plaintiff's right as a citizen and resident of the United States to freedom of speech, belief and association under the First Amendment to the Constitution of the United States, and his right to travel under the Fifth, Ninth and Tenth Amendments, and is so arbitrary and unreasonable as to deny plaintiff due process under the Fifth Amendment.

*Amended Complaint for Declaratory Judgment
and Injunction*

(d) The Korean War which was the basis for Proclamation 3004 of January 17, 1953 terminated more than eight years ago. The said Proclamation is accordingly inoperative as a matter of law, and there is in fact no emergency existing at the present time which could rationally justify the exercise of controls by the defendants over the travel of American citizens to and from the Republic of Cuba.

15. The Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph "14(c)"; and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power.

16. The defendant Secretary of State's regulations and announcements as set forth in paragraphs "6" through "8" above are invalid for the additional reason that Executive Order 7856 and Proclamation 3004 fail to contain any standards to guide the Secretary of State in promulgating the said regulations and to guide the American citizen in determining whether the regulations are supported by statute or proclamation.

17. The plaintiff has exhausted his administrative remedies.

18. The actions of the defendants in denying the plaintiff the passport facilities sought, in obstructing plaintiff's departure from the United States to Cuba, in interfering with his travel, and in threatening the imposition of crim-

*Amended Complaint for Declaratory Judgment
and Injunction*

inal and civil proceedings are causing plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment.

(a) Decreeing that plaintiff is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose;

(b) Decreeing that plaintiff's travel to Cuba and his use of the passport for that purpose will not constitute a violation of the passport laws of the United States, or of the Immigration and Nationality Act of 1952, or of the State Department's rules and regulations, or of the terms and conditions of his passport;

(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F. R. 492, and in Departmental Regulation 108.456, 26 F. R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, or by Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, or by Proclamation 3004, 18 F. R. 489.

(d) Decreeing that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid.

(e) Decreeing that the defendant Secretary of State's refusal to afford passport facilities to plaintiff so that he may go to Cuba is in violation of plaintiff's rights under the statutes and Constitution of the United States and the Declaration of Human Rights of the United Nations.

*Amended Complaint for Declaratory Judgment
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(f) Decreeing that the denial of the said passport endorsement and validation to plaintiff without a formal hearing at which evidence is adduced to show how the national security would be affected adversely by plaintiff's proposed trip to Cuba, violates plaintiff's rights to due process under the Fifth Amendment to the Constitution;

(g) Directing the defendant Secretary of State to validate plaintiff's passport for travel to and from Cuba;

(h) Enjoining the defendants from interfering with plaintiff's travel to Cuba, and from taking any adverse action whatsoever against plaintiff by way of passport cancellation, denial of future passport facilities, institution of criminal proceedings, advice or instructions to other governments and to common carriers, or other actions against the plaintiff by reason of his prospective travel to Cuba and such travel when consummated.

(i) And for such other and further relief as may be just and proper.

* * *

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, *Appellant*,

v.

DEAN RUSK, SECRETARY OF STATE, and ROBERT F.
KENNEDY, ATTORNEY GENERAL

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR ANATOL SCHLOSSER, AMICUS CURIAE

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THE INTEREST OF AMICUS

Anatol Schlosser, the amicus curiae,¹ has been indicted in the Eastern District of New York (No. 64 Cr. 137) on a charge of conspiring to violate section

¹ The consents of the parties to the filing of this brief have been filed with the Clerk.

215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, by agreeing to induce American citizens to depart from the United States for Cuba without bearing passports specifically validated for travel to Cuba.²

This appeal questions the authority of the Secretary of State to impose geographical restrictions on the travel of American citizens by providing that passports are not valid for travel to Cuba unless specially validated for that purpose. One member of the three-judge court below, Judge Clarie, held that such authority was derived from, among other sources, section 215. The appeal also seeks to enjoin the Attorney General from utilizing section 215 to enforce the Secretary's restrictions.

Amicus believes that section 215, properly construed, does not prohibit departures from the United States for off-limit destinations by citizens bearing passports which by their terms are not valid for travel to such areas. If amicus is correct, the indictment against him is clearly invalid, there being no other statute which makes it an offense to disregard passport territorial limitations.³ Trial of the indictment against amicus and his co-defendants has been postponed pending disposition of the present appeal.

² The indictment also charges three other defendants with the same conspiracy and on substantive counts that they travelled to Cuba without specially validated passports.

³ Amicus also believes, but does not brief the point, that there is no source of any kind for the asserted authority of the Secretary of State to limit the destinations for which passports are valid.

ARGUMENT

Section 215 Does Not Prohibit Travel to Restricted Destinations by Citizens Bearing Passports Not Specifically Validated for Such Travel.

Section 215(b) provides that while there is in force a prescribed Presidential proclamation,

“it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.”

A wilful violation of this provision is punishable by imprisonment up to five years and a fine up to \$5,000. 18 U.S.C. 1185(c).

Under State Department regulations, a passport is not necessary for travel between the United States and any place in the Western Hemisphere except Cuba. 22 C.F.R. 53.2 and 53.3(b). The exception requiring a passport for travel to Cuba was provided by an amendment to the regulations on January 16, 1961. State Dept. Reg. 108.456, 26 Fed. Reg. 482. Simultaneously, the Secretary of State issued Public Notice 179, 26 Fed. Reg. 492, which announced:

“Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.”

There are, therefore, two types of “valid” passports:
(1) Passports in standard form, which are valid to most places in the world, but not Cuba and a handful

of other countries; and (2) Passports which are valid for travel to Cuba (or other restricted countries), by virtue of special endorsement, as well as for travel to other places. It is the position of the government, as exemplified by its indictment of amicus, that the term "a valid passport," as used in section 215(b), means a passport which is valid for the particular destination. Accordingly, the theory runs, departure from the United States for Cuba by an American citizen is a criminal offense even if he bears a generally valid passport, if the passport has not been specifically validated for travel to Cuba.

The government's construction of section 215 is incorrect on several grounds.

1. Section 215(b) must be narrowly construed, both because of the familiar doctrine to that effect regarding penal statutes and because it is a legislative curtailment of a fundamental human liberty, the right to travel. *Kent v. Dulles*, 357 U.S. 116, 129.

The narrow, and indeed the common-sense, meaning of the term "a valid passport" in section 215 is satisfied by the kind of passport which is standard, which is issued to virtually all citizens who obtain passports, and which is indisputably valid for travel to all but a few countries of the world. The statute refers to *a* valid passport. It does not differentiate between various kinds of valid passports. Still less does it require a passport which is valid for a particular ultimate destination as well as for everywhere else. Indeed, section 215(b) would be intolerably vague if "a valid passport," as used therein, excludes the standard valid passport whenever the departing traveller has in mind an off-limits destination. This is particularly true if, as is alleged in the indictment against amicus, the off-

limits destination is to be reached by way of other countries, for travel to which the passport is concededly valid.

2. It is inconsistent with the purpose of section 215 (b) to make its application depend on the destination of a departing citizen and to use it to enforce the State Department's geographical restrictions on the use of passports. The section is concerned solely with entries into and departures from the United States. It says nothing about, and is not interested in, the place which the entering citizen left or the place to which the departing citizen is bound. The statute was intended to permit the sealing of our borders in time of war or national emergency so as to protect the nation from persons seeking to engage in dangerous missions, such as espionage, sabotage and the like.⁴ It is contrary to this purpose to utilize the statute not to prevent people from leaving the country, but to control the direction of the travel of persons whose non-dangerous intentions have been attested by the issuance to them of passports good for virtually all countries of the world. The

⁴ The House Committee on the Judiciary, in reporting the Immigration and Nationality Act, stated that sec. 215 adopted Presidential powers "in practically the same form as they now appear in the act of May 22, 1918 (40 Stat. 559)." H. Rept. No. 1365, 82nd Cong., 2d Sess., appearing in 2 U.S.C. Cong. & Adm. News, 1952, p. 1708. Since sec. 215 is essentially a reenactment of the 1918 Act, the legislative history of the 1918 Act, is meaningful. Cf. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 541. The 1918 Act was entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety." The House Foreign Affairs Committee explained the need for the 1918 travel controls over citizens primarily in terms of a desire to prevent "renegade Americans" from engaging in "the transference of important military information" to Germany. H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2-3.

borders of the United States are not sealed by measures which permit people to leave the country for all but a few destinations. Such measures, on the contrary, are an attempt to seal the borders of the latter places of destination.

Section 215(b) would be extended far beyond its purpose of preventing dangerous activities by sealing our borders if it should be applied to enforce the geographical limitations imposed by the State Department on passports. For those limitations are adopted not solely, or even primarily, for the purpose of preventing persons from engaging in dangerous missions. Instead, they are generally adopted to promote other reasons of foreign policy. Such is precisely the case with respect to the Department's restriction on the use of passports for travel to Cuba. When the Secretary of State first adopted that restriction on January 16, 1961, he announced its purpose as follows:

"In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest." (State Dept. Public Notice 179, 26 Fed. Reg. 492.)

And in an accompanying press release, the Department attributed its placing of Cuba off-limits to the government's "inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba." (State Dept. Press Release No. 24, Jan. 16, 1961.) Not a word was said to the effect that the restrictions were required to protect the security against dangerous activities of would-be travellers.

Moreover, it is an anachronism now to use section 215(b) even for its limited purpose of enforcing prohibitions on departures and entry without passports. For the emergency need to seal the borders which the section contemplates is belied for the present by the fact that passports are freely granted in the many thousands and by the elimination of the need for passports to depart to any place in the Western Hemisphere other than Cuba. The fact that there may be, as there always is, an "emergency" in our relations with other states does not mean that there is an emergency requiring the sealing of our borders. Palpably, in view of the extensive freedom of travel now allowed and enjoyed, the latter emergency no longer exists. The emergency having terminated, so has the emergency legislation. *Chastleton Corp. v. Sinclair*, 264 U.S. 543.

3. The government itself has on prior occasions recognized that section 215(b) is not available to enforce geographic restrictions on the use of passports. Thus in 1952, when the State Department announced that passports would not be valid for travel to various Communist countries, it stated: "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to these areas." 26 State Dept. Bulletin No. 672, May 12, 1952, p. 736. In a Special Message of July 7, 1958, the President requested Congress to enact passport-control legislation. He there urged that the Secretary of State should be given "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United

States." (3 U.S.C. Cong. & Adm. News, 85th Cong., 2d. Sess., 1958, p. 5465.)

4. The government's construction of section 215 obviously raises serious constitutional questions in addition to that of vagueness. Under that construction, the Secretary of State can, with the aid of criminal penalties, limit the constitutional right to travel without legislative guide lines, for unexpressed policy considerations, and with exceptions for such persons as he may favor.

Respectfully submitted.

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IN THE
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLANT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes, Proclamations, Executive Orders and Regulations Involved	2
Statement of the Case	2
1. The Statutes and Regulations	3
2. The Proceedings Below	4
3. Opinions in the District Court	6
Summary of Argument	10
Argument	15
Introduction	15
I—This was a proper case for a statutory court	16
II—There is no statutory authority for the Secretary's regulations	20
A. Appellant has a constitutional right to travel which can be regulated, if at all, only by an explicit statute with appropriate standards	20
B. Neither of the two statutes to which the complaint is addressed authorizes the Secretary's prohibition upon travel to Cuba	21
1. The Passport Act of 1926	21
2. The Immigration and Nationality Act of 1952	30
a) The original border control statute, the Act of May 2, 1918	31

b) The Amendment of June 21, 1941	34
c) The present statute	37
III—The President does not possess, nor has he exercised, an inherent executive power to prevent the travel of American citizens to a particular country	39
A. The court below did not uphold the claim of inherent executive power	39
B. There is no such inherent power	41
C. The President did not exercise any inherent power over travel in the instant case	43
D. Conclusion	45
IV—The Secretary's actions violate appellant's constitutional liberty of movement	45
V—The action was improperly dismissed as to the Attorney General	55
Conclusion	57
Appendix	58
CASES:	
Allen v. Grand Central Aircraft, 347 U. S. 535 ..	10, 18, 37
Aptheker v. The Secretary of State, 378 U. S. 500	15, 16, 21, 41, 47
Banco Nacional v. Sabbatino, 376 U. S. 406	54
Bauer v. Acheson, 106 F. Supp. 445 (D. C. D. C., 1952)	18, 19
Bauer v. United States, 244 F. 2d 794 (C. A., 1957)	53
Blackmer v. United States, 284 U. S. 421	41
Briehl v. Dulles, 101 U. S. App. D. C. 239, 248 F. 2d 561, reversed <i>sub nom. Kent v. Dulles</i> , 357 U. S. 116	24, 42

CASES (Cont'd):

PAGE

Brown v. United States, 8 Cranch (12 U. S.)	110	42
Burstyn v. Wilson, 343 U. S. 495	.....	24
Cantwell v. Connecticut, 310 U. S. 296	.....	21
Chastleton Corp. v. Sinclair, 264 U. S. 543	.....	52
Commissioner of Internal Revenue v. Acker, 361 U. S. 87	.....	24
Connally v. General Construction Company, 269 U. S. 385	.....	24
Cramp v. Bd. of Public Instruction, 368 U. S. 278	.....	24
East New York Savings Bank v. Hahn, 326 U. S. 230	.....	52, 53
Ex parte Endo, 323 U. S. 283	.....	21
F. C. C. v. American Broadcasting Co., 347 U. S. 284	.....	24
Federal Trade Commission v. Bunte Bros., 312 U. S. 349	.....	30, 43
Flemming v. Nestor, 363 U. S. 603	.....	17
Florida Lime Growers Inc. v. Jacobsen, 362 U. S. 73	.....	18, 19
Greene v. McElroy, 360 U. S. 474	.....	13, 14, 44, 45
Hannegan v. Esquire, Inc., 372 U. S. 146	.....	21
Idlewild Liquor Corp. v. Epstein, 370 U. S. 713	...	17
William Jameson & Co. v. Morgenthau, 307 U. S. 171	.....	18
Kent v. Dulles, 357 U. S. 116	.....	passim
Kennedy v. Mendoza-Martinez, 372 U. S. 144	.....	17
Korematsu v. United States, 323 U. S. 214	.....	20, 46
Kunz v. New York, 340 U. S. 290	.....	24
Lee v. Bickell, 292 U. S. 415	.....	18
MacEwan v. Rusk, — F. Supp. — C. A. 3rd, No. 14920	.....	41, 49
Mitchell v. Harmony, 13 How. (54 U. S.) 115	.....	42

CASES (Cont'd):

Niemotko v. Maryland, 340 U. S. 268	21, 24
Norwegian Nitrogen Co. v. United States, 288 U. S. 294	24
Panama Refining Co. v. Ryan, 293 U. S. 388	21
Phillips v. United States, 312 U. S. 246	18
Rusk v. Cort, 372 U. S. 144	10, 17, 18
Savorgnan v. United States, 338 U. S. 491	24
Schneider v. Rusk, 377 U. S. 163	19
Small v. American Sugar Refining Co., 267 U. S. 233	24
Smith v. United States, 360 U. S. 1	24
Sterling v. Constantin, 287 U. S. 378	18
Terrace v. Thompson, 263 U. S. 197	56
United States v. Laub (E. D. N. Y. Cr. Nos. 63-425 and 64-137)	29
United States v. Laub (E. D. N. Y. Cr. No. 64-350)	29
United States v. Rumely, 345 U. S. 41	21
United States v. Travis (S. D. Calif. No. 32380— C. D., appeal pending, C. A. 9th)	29
W. B. Worthen Co. v. Thomas, 292 U. S. 426	53
Winters v. New York, 333 U. S. 507	24
Woods v. Miller, 338 U. S. 138	53
Worthy v. Herter, 270 F. 2d 905 (C. A. D. C. 1959), cert. den. 361 U. S. 918	29, 30, 42
Worthy v. United States, 338 F. 2d 386 (C. A. 5, 1964)	29
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579	20, 21

**CONSTITUTION, STATUTES, PROCLAMATIONS,
EXECUTIVE ORDERS:**

Constitution of the United States:

First Amendment	14
Fifth Amendment	14, 21
Ninth Amendment	14
Act of February 4, 1815, 3 Stat. 199	22
Act of August 18, 1856, 11 Stat. 52, § 23	22
Act of June 14, 1902, 32 Stat. 386, c. 1088	22
Act of May 22, 1918, 40 Stat. 559	12, 31, 34, 35, 37, 38
Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. 211a 2, 3, 5, 7, 8, 9, 10, 11, 16, 17, 21, 22, 23, 24, 25, 26, 28, 30, 40	
Act of June 21, 1941, 55 Stat. 252	31, 35, 37
Administrative Procedure Act 1946, 5 U. S. C. 1009	1
Expatriation Act of 1868, 15 Stat. 223-224, R. S. 1999	24
Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U. S. C. 1185 ..	2, 3, 5, 7, 8, 9, 10, 11, 12, 16, 19, 24, 28, 29, 30, 31, 37, 39, 40, 51, 54
Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785	21
Revised Statutes (1874) § 4075	22
64 Stat. A454	4
66 Stat. 54, 57, 96, 137, 163, 190, 279, 330, 333	37
67 Stat. C31	4
76 Stat. 697	49

**CONSTITUTION, STATUTES, PROCLAMATIONS,
EXECUTIVE ORDERS (Cont'd):**

5 U. S. C. 156	2, 13, 44
22 U. S. C. 212	3
22 U. S. C. 1732	2, 8, 54
28 U. S. C. 1253	1
28 U. S. C. 1391	1
28 U. S. C. 2201	1
28 U. S. C. 2282	1, 10, 18, 19
28 U. S. C. 2284	1

PRESIDENTIAL PROCLAMATIONS:

No. 2487, May 27, 1941, 55 Stat. 1647	34
No. 2523, November 14, 1941, 55 Stat. 1696	37
No. 2914, December 16, 1950, 64 Stat. A454	2, 4, 51
No. 3004, January 17, 1953, 67 Stat. c. 31	2, 4, 14, 38, 43, 51

EXECUTIVE ORDERS:

No. 2119-A, January 12, 1915	44
No. 2286-A, December 17, 1915	44
No. 2362-A, April 17, 1916	44
No. 2519-A, January 24, 1917	44
No. 2932, For. Rel. 1918, Supp. 2	34
No. 4382-A, February 12, 1926	44

EXECUTIVE ORDERS (Cont'd):

No. 4800, January 31, 1928	44
No. 5860, June 22, 1932	44
No. 7856, March 31, 1938, 3 F. R. 799, 22 C. F. R. 51.75	2, 3, 13, 23, 25, 43, 44

DEPARTMENTAL REGULATIONS:

22 C. F. R. 51.74	3
22 C. F. R. 53	4, 37, 43
22 C. F. R. 53.3	21, 30
Departmental Order No. 1003, 6 F. R. 6069, amended by Departmental Regulation No. 11, August 27, 1945, 10 F. R. 11046	37
Public Notice 179, 26 F. R. 492	4, 21, 30

MISCELLANEOUS:

Borchard, Challenging Penal Statutes by Declaratory Action, 53 Yale L. J. 445 (1943)	56
Declaratory Judgments, 2d Ed., 1941	56
Chafee, Three Human Rights in the Constitution (1956)	46
Comment, 61 Yale L. J. 171	50
56 Cong. Rec. 6029	31, 33
56 Cong. Rec. 6030	33
56 Cong. Rec. 6031	33
56 Cong. Rec. 6064	33
56 Cong. Rec. 6066	33
56 Cong. Rec. 6067	33
56 Cong. Rec. 6191	34

MISCELLANEOUS (Cont'd):

56 Cong. Rec. 6192	33, 34
56 Cong. Rec. 6194	34
56 Cong. Rec. 6248	34
87 Cong. Rec. 5042	36
87 Cong. Rec. 5047	36
87 Cong. Rec. 5048	35
87 Cong. Rec. 5053	36
87 Cong. Rec. 5325-5326	36
87 Cong. Rec. 5386-5389	36
87 Cong. Rec. 5387	37
87 Cong. Rec. 5416	36, 37
65th Cong., 2d Sess., H. R. 485	31, 41
65th Cong., 2d Sess., S. R. 431	31, 34
69th Cong., 1st Sess., H. 11497	22
69th Cong., 1st Sess., H. R. 1358	22
69th Cong., 1st Sess., H. R. 12495	22
69th Cong., 1st Sess., S. R. 1177	22
73rd Cong., 2d Sess., S. R. 1005	56
77th Cong., S. R. 444	35
82nd Cong., 2d Sess., H. R. 1365	37
85th Cong., 1st Sess., S. 2770, H. R. 8655	29
85th Cong., 1st Sess., H. R. 53	30
85th Cong., 2d Sess., S. 3344, 4030, 4110	29
85th Cong., 2d Sess., H. R. 13005, 13318	29
85th Cong., 2d Sess., S. Doc. 64	29

MISCELLANEOUS (Cont'd):

86th Cong., 1st Sess., S. 1303, 2095, 2287, H. R. 2468, 5455, 7315, 8329, 8930, 9069	29
87th Cong., 1st Sess., H. R. 388, 935, 1086, 2485	29
88th Cong., 1st Sess., H. R. 2559, 8652	29
Declaration of Costa Rica	49
Dept. of State, The American Passport (1898) ..	22
44 Dept. of State Bull. 103 (1961)	48
26 F. R. 482	4
26 F. R. 492	4
3 F. R. 799, 805	3
Freedom to Travel (Report of Special Commit- tee to Study Passport Procedures, Assn. of the Bar of the City of New York, 1958)	26, 28, 48, 49, 50, 51
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Hearings on Extension of Passport Control, Hear- ings before the Committee on Foreign Affairs of the House of Representatives, 69th Cong., 1st Sess. (1926)	34, 44
Hearings before the Senate Committee on For- eign Relations on Department of State Pass- port Policies, 85th Cong., 1st Sess. (1957) ..	27, 28, 39, 40, 49, 50, 51
Hearings before the Senate Committee on For- eign Relations on Passport Legislation, 85th Cong., 2d Sess. (1958)	27, 28, 39, 47, 50
Hearings before the Subcommittee on Constitu- tional Rights of the Senate Committee on the Judiciary, 84th Cong., 2d Sess.	20

	PAGE
MISCELLANEOUS (Cont'd):	
House Doc. No. 417, 85th Cong., 2d Sess.	29
House Rep. No. 1358, 69th Cong., 1st Sess. (1926)	22
House Res. No. 64, 41 Stat. 1359 et seq.	34
Dept. of State, The American Passport (1898) ...	23
2 Hyde, International Law (2d rev. ed.) § 401	25, 34
Jefferson's Writings, Ford. Ed. 1894, Vol. III	41
3 Moore, Digest of International Law § 2 (1906) ..	25, 26
New York Times, Sept. 5, 1955>	50
Report of the Commission on Government Security Pursuant to Public Law 304, 84th Cong. (1957)	27, 29
Saturday Evening Post Editorial, Nov. 14, 1964 ...	51
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Press Release No. 24 (1961)	4

IN THE
Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

Opinions Below

The opinions below (R. 32-67) are reported at 228
F. Supp. 65.

Jurisdiction

The judgment below (R. 67-68) was dated and entered
on March 2, 1964. Appellant filed a notice of appeal in
the court below on March 16, 1964 (R. 68-69).

The District Court had jurisdiction under 28 U. S. C.
1391, 2201, 2282 and 2284, and under Section 10 of the
Administrative Procedure Act, 5 U. S. C. 1009. Jurisdic-
tion of this appeal is conferred on the Court by 28 U. S. C.
1253.

Following the Government's motion to dismiss or to affirm the judgment below, which appellant opposed, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits (R. 70).

Questions Presented

1. Whether this was a proper case for a statutory court.
2. Whether the Secretary of State is authorized by 22 U. S. C. 211a, or by 8 U. S. C. 1185, to prohibit, upon pain of criminal prosecution, the travel of American citizens to and from Cuba.
3. Whether the Secretary has inherent non-statutory authority to exercise such power.
4. Whether the statutes, as construed and applied to appellant, are constitutional.
5. Whether an action will lie against the Attorney General and the Secretary of State to restrain their enforcement of the statutes.)

Statutes, Proclamations, Executive Orders and Regulations Involved

The principal statutes involved are those considered by the Court in *Kent v. Dulles*, 357 U. S. 116, the Act of July 3, 1926, c. 772, § 1, 44 Stat. Part 2, 887, 22 U. S. C. 211a, and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185. These statutes and the pertinent portions of 5 U. S. C. 156 and 22 U. S. C. 1732, Presidential Proclamations No. 2914 of December 16, 1950 and No. 3004 of January 17, 1953, Executive Order No. 7856 of March 31, 1938, and the regulations of the Secretary of State relating to travel are printed in the Appendix, *infra*, pp. 58-59.

Statement of the Case

In this action appellant seeks a judgment (1) declaring illegal the Secretary of State's refusal to endorse his passport for travel to Cuba, (2) enjoining the Government's interference with such travel by threat of criminal proceedings and otherwise, and (3) enjoining as unconstitutional the enforcement of the statutes upon which the Secretary relies.

1. The Statutes and Regulations

The Government's actions whose validity is challenged by appellant are taken pursuant to passport statutes, proclamations and executive orders of the President, and regulations of the Secretary of State.

These statutes and regulations provide as follows: 22 U. S. C. 211a authorizes the Secretary of State to "grant and issue passports"¹ to citizens and other persons who owe allegiance to the United States.² Under the implementing Executive Order No. 7856,³ the Secretary was authorized in his discretion to refuse to issue passports and to restrict them against use in certain countries. In *Kent v. Dulles, supra*, the Court refused to uphold this discretion to refuse a passport.

Section 215 of the Immigration and Nationality Act of 1952 (herein referred to as 8 U. S. C. 1185, App. *infra*, pp. 58-61), authorizes the President, in time of war or national emergency proclaimed by him, to invoke statutory restrictions making it unlawful, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, * * * for any citizen of the United States to depart from

¹ 44 Stat. 887; App., *infra*, p. 58.

² 22 U. S. C. 212, 32 Stat. 386.

³ 3 F. R. 799, 805, 22 C. F. R. 51.74, App., *infra*, p. 62.

or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.”

A state of emergency was declared on December 16, 1950 through Presidential Proclamation No. 2914 by reason of the Korean War.⁴ Thereafter, on January 17, 1953, Presidential Proclamation No. 3004⁵ made the “departure and entry of citizens and nationals of the United States from and into the United States . . . subject to the regulations prescribed by the Secretary of State” in 22 CFR 53.1-53.9. These regulations required passports for all such entry to or departure from the United States except in the case of travel in the Western Hemisphere. The proclamation also authorized the Secretary “to revoke, modify or amend such regulations as he may find the interests of the United States to require”.

Eight years later, on January 16, 1961, the Secretary of State issued Public Notice No. 179,⁶ making passports “invalid” for travel to Cuba, Press Release No. 24 to the same effect,⁷ and Departmental Regulation 108.456⁸ amending his regulations so as to require a valid passport for entry to and departure from the United States where Cuban travel was involved.

2. The Proceedings Below

Appellant is a citizen of the United States holding a valid American passport (R. 2). On March 31, 1962 he requested the Secretary to endorse that passport for travel to Cuba (R. 3). This request was rejected and the Secretary stated that the appellant was not entitled to travel to Cuba (R. 3).

⁴ 64 Stat. A454, App., *infra*, pp. 62-63.

⁵ 67 Stat. C31, App., *infra*, pp. 63-66.

⁶ 26 F. R. 492, App., *infra*, p. 68.

⁷ App., *infra*, p. 69.

⁸ 26 F. R. 482.

Earlier, the Secretary had threatened the institution of criminal proceedings against United States citizens traveling to Cuba without such passport endorsement, and the Attorney General had instituted at least one such criminal prosecution against an American citizen (R. 3, 8). The appellant also claims that common carriers have refused to carry American citizens not possessing such validated passports, and that foreign governments have refused to permit the departure of American citizens from their territories for Cuba under similar circumstances (R. 3).

Appellant accordingly instituted this action for declaratory judgment and injunction and recited the foregoing facts in his complaint. He also alleged that the Secretary's actions were not authorized by the two principal statutes involved, 22 U. S. C. 211a and, 8 U. S. C. 1185, and that they were unconstitutional if they did give such authority (R. 3-5).

The Secretary answered, essentially admitting the factual allegations of the complaint (R. 10). The answer however denied "that the sources of his authority to place restrictions on travel by United States citizens to Cuba are limited to the particular statutes, proclamation, and executive order enumerated by the plaintiff, and further alleges that he also derives his authority aforesaid from the inherent power of the executive over foreign affairs" (R. 8). The answer also denied the existence of sanctions against common carriers and the Government's influence upon foreign governments (R. 8). Affirmative defenses alleged that the appellant "is not eligible to have his passport validated for travel to Cuba, a country with which the United States does not maintain diplomatic relations" (R. 9), that the "action of the defendant complained of is necessary to the conduct of foreign relations" (*ibid.*) and that "[w]ithin the reasonable and proper exercise of foreign relations, the Executive may properly prevent travel by United States citizens to certain designated

geographical areas of the world when necessitated by foreign policy considerations" (*ibid.*).

Upon appellant's request (R. 11) a statutory court was designated by the Chief Judge of the Court of Appeals for the Second Circuit (R. 14) and the statutory court, after hearing the Government's challenge to its jurisdiction under 22 U. S. C. 2282 and the parties' respective motions for summary judgment (R. 12, 15) determined that it did have such jurisdiction, denied appellant's motion for summary judgment, granted that of the Secretary of State, and dismissed the action against the Attorney General (R. 67-68).

3. Opinions in the District Court

A majority in the District Court (Circuit Judge Smith and District Judge Clarie) agreed that this was a proper case for a statutory court. A different majority (District Judges Clarie and Blumenfeld), upheld the constitutionality of the statutes. All three judges agreed that the action against the Attorney General should be dismissed.

(a) The opinion of the court below was written by District Judge Clarie (R. 32-46). He upheld appellant's right to a three-judge court because "this plaintiff, seeks affirmatively to enjoin the operation of a passport regulatory system" (R. 36) and because "[a] substantial constitutional question is in issue. The fact that the statutes' validity and their attendant regulations are in this instance being upheld, rather than nullified, does not alter the principle" (R. 36-37).

On the merits, Judge Clarie held that Congress had authorized the Secretary through both statutes to prohibit travel to Cuba and that the statutes were valid (R. 37). In his view, Congress had given the President passport power "within broad bounds of Executive discretion" (R. 43), and the absence of standards was excused by the need for "considerable discretion" in foreign affairs (R. 45). This apparently was the result of his view that "[t]his area of

government requires a joint-control effort of the Congress and the Executive, if the intended results are to be obtained" (R. 39). Judge Clarie did not indicate the reasons for his belief that the ban on travel to Cuba was justified, unless this was the intendment of his references to the provisions of 22 U. S. C. 1732, directing the Executive to protect the rights of American citizens on foreign soil (R. 49) and to the need "to prevent incidents occurring in those countries, where normal diplomatic relations are non-existent" (R. 39). This Court's decision in *Kent* was distinguished on the ground that *Kent* involved the denial of passports because of "beliefs or associations" (R. 43).

The injunction against the Attorney General was denied by Judge Clarie because in his view the statutes were valid and "[t]here are no grounds upon which this Court would be justified in interfering with the criminal enforcement aspects of this statute" (R. 46).

(b) United States Circuit Judge J. Joseph Smith agreed that the court had jurisdiction (R. 52) but supported appellant's argument on the merits. He stated:

"If § 211(a) of the Passport Act of 1926, 22 U. S. C. § 211(a) (1958), the sole statute cited in the regulations as a statutory basis, is construed at face value as a delegation of discretionary power to the Executive to impose restrictions on the issuance of passports to American citizens, it poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice." (R. 52)

However, Judge Smith added:

" * * * I am unable to find in either § 211(a) of the Passport Act of 1926 or in § 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (1958), any basis for the area restrictions in the regulations proclaimed by the State Department. Neither act was designed to meet the present problem." (*Ibid.*).

He pointed out that § 211a was merely intended to centralize passport issuance in the federal government and that "the language of § 215 [8 U. S. C. 1185] says nothing about empowering the Secretary of State to restrict travel to certain foreign areas" (R. 54). Relying upon this Court's decision in *Kent v. Dulles*, *supra*, he insisted that a narrow construction was required "to preserve individual rights and to avoid constitutional doubts" (*ibid.*), and he described the majority's construction of 8 U. S. C. 1185 as "a truly remarkable feat of judicial gymnastics." (*Ibid.*)

Judge Smith also pointed out that "[e]ven if one adopts the view of the four dissenters in *Kent v. Dulles* . . . there is no finding that travel to Cuba by Zemel or those similarly situated would endanger the internal security of the United States" (R. 54). He noted that the majority had not adopted the view of the Court of Appeals for the District of Columbia "which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs" (R. 55), and pointed out that "*Kent v. Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad" (*Ibid.*).¹

Regarding the majority's reliance upon 22 U. S. C. 1732 (relating to the protection of American citizens) as rather "dubious" proof "that passport control is so intertwined with foreign affairs," he said that "the entire approach flies in the teeth of the language of *Kent v. Dulles*" (R. 55). Pointing out that none of the bills seeking to give the Secretary power over area travel had become law, he emphasized that "such legislation is necessary, for the regulations cannot be supported by the existing statutes, inherent executive power, or by any executive agreement" (R. 56). His conclusion was that "Congress should take the responsibility for authorizing them after a full fact-finding inquiry" (*Ibid.*).²

(c) District Judge Blumenfeld alone urged that this was a case for a single district judge. Conceding that the constitutional question was substantial, he regarded the lawsuit as directed principally against the regulations (R. 59). In particular, he viewed 8 U.S.C. 1185 as irrelevant since "the defendant expressly disclaims reliance upon it here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

On the merits, Judge Blumenfeld upheld the Secretary on the ground that the regulations were supported by 22 U. S. C. 211a (R. 63) and he denied that the Court had limited the Secretary's right to deny passports to the two instances specified in *Kent* (R. 64). While agreeing that "the criteria for measuring the Secretary's discretion have not been determined other than it may not be 'unbridled' " (R. 64), he considered that negative criterion sufficient because "the fact that Congress gave it to the Executive indicates that it is to be exercised in relation to his powers to conduct foreign affairs" (R. 64). He disposed of appellant's claim of an unconstitutional delegation of power with the remark that the standard was sufficient if it merely required "a reasonable connection to the conduct of foreign affairs" (R. 65); this connection was sufficient, in his view, because "the United States has broken off diplomatic relations" with Cuba (R. 65). He rejected the test of "gravest imminent danger to the public safety" suggested in *Kent*, said that the Secretary's prohibition of travel to Cuba "relates not to internal security but to foreign affairs" (R. 66), and held that "the right to travel is properly subject to a reasonable prohibition" (*Ibid.*).

Summary of Argument

I.

A. The statutory court had jurisdiction under 28 U. S. C. 2282. All the necessary elements for the convening of the court were present: (1) the complaint alleged a basis for equitable relief; (2) the constitutional question raised was substantial, and (3) the appellant sought to enjoin the enforcement of two federal statutes, 22 U. S. C. 211a and 8 U. S. C. 1185, as unconstitutional. The appellees met the constitutional issue by asserting that both statutes (as well as an inherent executive power) authorized the Secretary's regulations, and that the statutes were constitutional. The court below upheld the Secretary's reliance upon the challenged statutes.

B. The three-judge court was not deprived of jurisdiction because appellant also denied that the statutes authorized the Secretary's regulatory action. A suitor is not required to surrender all arguments other than the constitutional attack upon a statute in order to have a statutory court. Where, in addition, he claims that the statute does not authorize the regulations or that the latter are otherwise invalid, the Court has entertained and determined appeals from three-judge courts. *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535; *Rusk v. Cort*, 372 U. S. 44.

C. Sound public policy supports the jurisdiction of a statutory court in the present case. Congress created the statutory courts because it was concerned about the danger of permitting a single judge to enjoin the operation of a statutory scheme. Thus, in a close case it is preferable that a plaintiff seek a statutory court. However, there is no possible doubt here as to the propriety of a three-judge court in view of the issues as framed by the parties and resolved by the decision of the court below.

II.

The Secretary's regulations are not authorized by the Passport Act of 1926, 22 U. S. C. 211a, or by § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1185. Neither statute, either in its language, legislative history or purpose, authorizes the Secretary's regulations.

A. 22 U. S. C. 211a has already been interpreted by the Court in *Kent v. Dulles, supra*, as merely centralizing passport power in the Secretary of State. It does not, in terms, authorize the Secretary to prohibit travel to particular areas. When Congress has intended to prohibit travel to particular areas, it has easily found the necessary language. Section 211a could not have been intended to authorize area restrictions, for at the time of its passage in 1926 and that of its progenitor statutes in 1856 (11 Stat. 52, 60-61), and in 1902 (32 Stat. 386), a passport was not a requirement for lawful departure, entry or travel.

In *Kent*, the Court construed this very statute narrowly because of the constitutional problems which are raised by a curtailment of basic liberties. Here, as there, to import such additional power into the general language of Section 211a would be to raise constitutional questions of vagueness and of delegation of legislative authority.

There can be no claim of a substantial administrative practice prior to and embodied by Congress in the Passport Act of 1926. The subsequent pattern of governmental action supports appellant's construction of the statute: (1) passport restrictions were of a wartime character; (2) restrictive passport language was never claimed to carry criminal or other sanctions; (3) the State Department explicitly indicated the contrary in construing the passport "restrictions" of May 1952 (*infra*, p. 27); (4) despite frequent disregard of such restrictions during three decades, there were no criminal prosecutions until 1963; (5) the Department showed considerable doubt before congressional

committees in its claims of statutory power; (6) immediately following the decision in *Kent*, the Administration unsuccessfully sought legislation giving it the right to impose area restrictions; and (7) this was followed for six years by similar attempts to obtain legislation, all unsuccessful.

B. 8 U. S. C. 1185 is not cited as a source of authority in the Public Notice or in the amendment to the regulations, as Judge Blumenfeld points out below (R. 67-68). The statutory language shows it to be a border-control statute rather than a restriction upon areas of travel. The legislative history is devoid of reference to area restrictions. The statute was originally concerned with the entry and departure of aliens, clearly a matter unrelated to area restrictions. Nor have area restrictions ever been based upon 8 U. S. C. 1185 or upon its predecessor statutes of 1918 and 1941. This statute, too, was the subject of the Court's narrow construction in *Kent v. Dulles, supra*, by reason of the constitutional problems involved.

Even if 8 U. S. C. 1185 were more than a border-control statute, it could not support the Secretary's regulations. First, it is a national defense statute under the war power directed against espionage and related criminal activities. No war or national emergency relevant to Cuban travel exists presently and this Court could appropriately recognize that fact. Second, the ban upon Cuban travel was not claimed to be nor was it an exercise of the war power.

III.

A. The court below did not adopt the Secretary's claim of an inherent right to control travel under the foreign affairs power (R. 8). Instead, it held that the Secretary had acted pursuant to statutory power, although the majority disagreed in part as to the authorizing statutes.

The claim of inherent executive power—on grounds of foreign affairs or otherwise—has been disposed of by the

Court's decision in *Kent v. Dulles, supra*. There the Court held, first, that passport control over travel could not be subsumed under the foreign affairs power, and second, that travel restriction required, as a minimum, the exercise of the law-making functions of the Congress.

This lack of executive power over the movement of citizens has been repeatedly admitted by responsible officials of the Government. It has been demonstrated by the vigorous efforts, all unsuccessful, of the Executive and members of Congress to obtain legislation authorizing the Secretary to impose geographic restrictions.

B. If such an inherent executive power existed, its importance, in terms both of source of foreign relations power and of its impact upon individual liberty, would require that it be exercised by the President himself. But the President has not imposed any prohibition upon travel to Cuba; it was the State Department through an Under Secretary of State for Administration which purported to determine that the national interest required the ban upon the travel of American citizens to Cuba.

The provision of Executive Order 7856 authorizing the Secretary to restrict passports was not intended to give the Secretary the right to determine to what countries an American citizen might travel. At the time of promulgation, such restrictions did not prevent lawful departure from the United States or travel to other countries since passports were not then required by the laws of the United States. In any event, the claims of discretionary power conferred by that executive order upon the Secretary were rejected by the Court in the *Kent* case.

Nor does 5 U. S. C. 156 support the President's delegation of power to the Secretary. That statute merely gives administrative authority, and "decisions of great constitutional import" (*Greene v. McElroy*, 360 U. S. 474, 507) must be authorized by "explicit action" (*ibid.*),

IV

The Secretary's prohibition of travel to Cuba is a violation of appellant's constitutional right to travel under the First, Fifth and Ninth Amendments. The prohibition interferes with the citizen's right to be well informed on public issues. It also conflicts with the basic principles of liberty of movement set forth in the Universal Declaration of Human Rights adopted by the United Nations. The right to travel is an important liberty so "basic to our scheme of values", *Kent v. Dulles, supra*, at 127, that only urgent necessity can justify its restriction. In the absence of war or similar situation "of comparable magnitude", *Kent v. Dulles, ibid.*, it cannot be said that there was an urgent necessity for the travel ban. The Korean War emergency declared in 1950 was not the claimed basis for the restriction and, in fact, could not constitutionally justify it. The Court has the power to determine whether that emergency declaration is in effect today and whether it bears any possible relationship with the ban on travel to Cuba.

The restriction was incidental to the breach of diplomatic relations resulting from the reduction of the American Embassy staff in Havana. That breach did not make this country unable to protect American citizens visiting Cuba, and, indeed, there is no indication of any special need for such protection or of the inability of the Swiss Embassy in Havana to represent American interests. Maintenance of diplomatic relations with another country has never been a condition precedent to the lawful travel of American citizens.

There is reason to believe that the ban upon travel to Cuba was intended to put that country into a form of Coventry and to act as an example to Latin American countries. Neither objective can constitutionally justify the interference with the travel of American citizens.

V

The court below was in error in dismissing the complaint against the Attorney General. The complaint alleged that he was interfering with the travel of American citizens to Cuba and that he had instituted criminal prosecutions based upon such travel. The traditional requirements for a declaratory judgment action were present. The suit was not premature in light of the allegations of present interference and of the criminal prosecutions then and thereafter instituted by the Attorney General.

ARGUMENT

Introduction

This case involves the same basic issue which was before this Court in two recent cases, *Kent v. Dulles*, 357 U. S. 116, and *Aptheker v. The Secretary of State*, 378 U. S. 500, the constitutional protection of liberty of movement. In *Kent* and *Aptheker*, it was the right to depart from the United States; here it is the right to travel to a country which the State Department declares to be out of bounds.

This case also involves the same two statutes and executive orders with which this Court dealt in the *Kent* case. If anything, the Government's position in *Kent* found greater support in statutes, executive orders and the administrative practice of the Secretary than it does here. This case requires the same concern which the Court showed in *Kent* and *Aptheker* for liberty of movement, and the application of the same principles of statutory construction.

I

This was a proper case for a statutory court.

We address ourselves preliminarily to the matter of the Court's jurisdiction in view of its order of October 12, 1964 postponing that question to the hearing of the case on the merits (R. 70).

A. The amended complaint challenged the Secretary's passport restrictions upon appellant's travel and the appellees' threats of criminal prosecution, on two independent grounds: (1) that they were unauthorized by statute, and (2) that the Passport Act of 1926, 22 U. S. C. 211a and the Immigration and Nationality Act of 1952 § 215, 8 U. S. C. 1185, relied upon by appellees

"are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph 14(c); and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power." (R. 4)

Appellant therefore sought judgment decreeing, *inter alia*, "that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid" (R. 5).

Appellees answered that both statutes (as well as an inherent executive power) authorized the Secretary's regulations, violation of which was punishable under 8 U. S. C. 1185. They denied that the two statutes were unconstitutional (R. 8).

B. The court below unanimously agreed that the constitutional question was a substantial one (R. 36, 52, 58). This was a necessary consequence of this Court's decisions in *Kent v. Dulles*, *supra*, and *Aptheker v. The Secretary*

of *State, supra*, that travel was an important liberty protected by the Constitution.

Two members of the court, District Judges Clarie and Blumenfeld, held that the restrictions upon appellant's travel were authorized by Congress (R. 37, 63). Judge Clarie relied upon both statutes, Judge Blumenfeld only upon Section 211a (*ibid.*). Circuit Judge Smith, who dissented on the merits, agreed, however, that a three-judge court had jurisdiction "for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports" (R. 52).

The majority below correctly held that a three-judge court was necessary since "the constitutional question raised is substantial * * * the complaint at least formally alleges a basis for equitable relief, and * * * the case presented otherwise comes within the requirements of the three-judge statute" (R. 35-37), *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715. In view of the injunctive relief sought, it cannot be said here as in *Flemming v. Nestor*, 363 U. S. 603, 607, that the action "did not seek affirmatively to interdict the operation of a statutory scheme".⁹ A judgment for appellant would necessarily "put the operation of a federal statute under the restraint of an equity decree" (*ibid.*).

C. Judge Blumenfeld was in error in regarding this as "a case for a district court of one judge" (R. 57) on the ground that the "focal point of the plaintiff's attack is clearly upon the regulation itself" (R. 59). Appellant's assertion that the regulations were not authorized by Congress was consistent with his challenge to the constitutionality of the statutes relied upon by the Government (R. 5-6).

⁹ The distinction between *Rusk v. Cort*, 372 U. S. 144 (three-judge court) and *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, is that in the latter case "the issues were framed so as not to contemplate any injunctive relief" (*id.* at 153).

A suitor who challenges the validity of a statute relied upon by the Government to authorize regulatory action properly sues under 28 U. S. C. 2282, even where, alternatively, he argues that the statute does not authorize the regulations or that the latter are not valid. This is what occurred in *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541, 553, where a three-judge court heard a complaint that certain regulations "are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution."¹⁰ See also *Rusk v. Cort*, 372 U. S. 144, *Bauer v. Acheson*, 106 F. Supp. 445 (D. C. D. C., 1952). See also *Lee v. Bickell*, 292 U. S. 415, 417, 425; *Florida Lime Growers, Inc. v. Jacobsen*, 362 U. S. 73, 77, 80-81, 85; *Sterling v. Constantin*, 287 U. S. 378, 393, 394.

In *Phillips v. United States*, 312 U. S. 246, 252, cited by Judge Blumenfeld, the plaintiff sought "a restraint not of a statute but of an executive action". Similarly, *William Jameson & Co. v. Morgenthau*, 307 U. S. 171, 173, is inapposite since it held that "no substantial question of constitutional validity was raised" with respect to the statute there involved (*id.* at 173). That cannot be said of the instant lawsuit in the light of this Court's recent decisions on freedom of movement, *infra*, pp. 20-21. It is this critical factor that distinguishes the *William Jameson* case from the instant one.

Judge Blumenfeld was also in error in relying upon the fact that the petitioners in *Kent v. Dulles*, *supra*, had not sought a three-judge court even though the same two statutes were involved (R. 60). The difference between the two cases is that in *Kent* the petitioners did not seek to enjoin the operation of the two statutes, whereas that is the objective of appellant's complaint. Indeed, this distinc-

¹⁰ The complaint in *Rusk v. Cort*, *supra* (par. 19, p. 4; Transcript of Record, October Term 1960, No. 567), alleged, *inter alia*, the absence of evidence against plaintiff and that the statute whose constitutionality was under attack was inapplicable to him.

tion was anticipated by the Solicitor General in his brief in *Kent*.¹¹

D. One final consideration supports the jurisdiction of a statutory court. It is the public policy, as enunciated by the several acts of Congress relating to statutory courts, that an attack upon the enforcement of a statute as unconstitutional must be brought before a statutory court in view of the danger of permitting a single judge to stay a statutory scheme. In a close question, it is therefore preferable that a plaintiff seek a statutory court. That such close questions frequently arise in this somewhat amorphous area is manifested by such recent cases as *Schneider v. Rusk*, 377 U. S. 163, and *Florida Lime Growers, Inc. v. Jacobsen*, 362 U. S. 73, 77, 80-81, 85. The reluctance of lower courts in the last two instances to designate statutory courts was not only in conflict with the basic policy of Congress, but injured the parties litigant by extended delays in adjudication.

In noting these policy considerations, we do not suggest that the instant case is a close one. The issues as framed by the parties and the views of the judges below on the merits clearly involve the constitutionality of two federal statutes whose enforcement was unsuccessfully sought to be restrained. This leaves no possible doubt as to the necessity for a three-judge court and the consequent jurisdiction of this Court upon the present appeal.

¹¹ The Solicitor General said, in response to the constitutional attack of the petitioners in *Kent v. Dulles* upon 8 U. S. C. 1185, "An initial jurisdictional problem is raised by the fact that petitioners, while attacking the Secretary's regulations as unauthorized by the statutes and unlawful under the First and Fifth Amendments, did not challenge the constitutionality of the statutes themselves in their complaints (R. 2-4, 100-103). Accordingly, the constitutionality of 8 U. S. C. 1185 should not be open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in the District Court, a problem as to convening a three-judge district court would have arisen. See 28 U. S. C. 2282; cf. *Bauer v. Acheson*, 106 F. Supp. 445 (D. D. C., three-judge district court)." (Respondent's Brief in *Kent v. Dulles*, Oct. Term 1957, No. 481, pp. 91-92, n. 98.)

There is no statutory authority for the Secretary's regulations.

We address ourselves first, in accordance with the traditional policy of this Court—prior to a review of the constitutional issues—to the question of whether the statutes relied upon by the Secretary authorize the ban upon travel to Cuba and the ancillary sanctions, including criminal penalties.

A. Appellant has a constitutional right to travel which can be regulated, if at all, only by an explicit statute with appropriate standards.

We necessarily begin this statutory construction with this Court's determination that there is a constitutional right to travel which this Court has upheld twice in recent Terms against both executive and legislative interference.

In *Kent v. Dulles*, 357 U. S. 116, 125, the Court said: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." It said: "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer* (343 U. S. 579)." *Id.* at 129. Emphasizing the necessity for legislative action, it said: "We are first concerned with the extent, if any, to which Congress has authorized its curtailment" (357 U. S. 116, 127). And it said, citing *Korematsu v. United States*, 323 U. S. 214, 218, that this right to travel was subject to restriction only where, upon a showing of "the gravest imminent danger to the public safety" . . . the Congress and the Chief Executive moved in coordinated action" (357 U. S. 116, 128). The Court added:

" . . . the right of exit is a personal right included within the word 'liberty' as used in the Fifth

Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet and Tube Co. v. Sawyer*, *supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420-430. Cf. *Cantwell v. Connecticut*, 310 U. S. 296, 307; *Niemotko v. Maryland*, 340 U. S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo*, 323 U. S. 283, 301-302. Cf. *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156; *United States v. Rumely*, 345 U. S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." (*Id.* at 129)

In *Aptheker v. The Secretary of State*, 378 U. S. 500, the Court reiterated the principle established in *Kent*. It held that an Act of Congress, Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785, was unconstitutional because it abridged the right to travel guaranteed by the Fifth Amendment.

B. Neither of the two statutes to which the complaint is addressed authorizes the Secretary's prohibition upon travel to Cuba.

1. THE PASSPORT ACT OF 1926

Section 1 of the Passport Act of 1926, 22 U. S. C. 211a, is cited in Public Notice 179, 26 F. R. 492, as the sole statutory authority for the declaration that travel to Cuba is "inimical to the national interest." The same statute is cited as the sole authority for Departmental Regulation 108.456, 26 F. R. 482, amending 22 CFR 53.3, so as to require passports for entry to and departure from the United States where travel to Cuba was involved.

The language of Section 211a does not authorize area restrictions any more than it authorizes the denial of passports for political reasons. See *Kent v. Dulles*, *supra*, at page 130. When Congress intended to prohibit travel to certain areas, it used unmistakable language for that purpose. Thus *e.g.* the Act of February 4, 1815 directed that no citizen or resident "be permitted to cross the frontier into the enemy's country or territory in his possession without a passport", 3 Stat. 199.¹²

22 U. S. C. 211a merely authorizes the Secretary to issue passports. Its purpose, as described by the Court, was to deprive "various federal officials, state and local officials and notaries public" of the power to issue passports and to centralize that power in the Secretary of State. (*Kent v. Dulles*, 357 U. S. at 123.)¹³

There is nothing in the legislative history of Section 211a or its predecessor statutes to indicate an intention to authorize area restrictions. This section is derived from the Act of August 18, 1856, 11 Stat. 52, 60-61, a general *Act to Regulate the Diplomatic and Consular Systems of the United States*, which, to the extent relevant, was merely intended to prevent persons other than the Secretary of State from issuing passports.¹⁴ Area restrictions could not have been contemplated since at the time of its original passage in 1856 a passport was not needed for travel, and

¹² Another example of an area limitation imposed by Congress appears in the Act of June 30, 1834, 4 Stat. 729.

¹³ See also 9 Op. Atty. Gen. 350 (1859), Dep't of State, *The American Passport* (1898) 36-42.

¹⁴ The provision under discussion appears in essentially the same form in the Revised Statutes (1874) Section 4075; the Act of June 14, 1902, 32 Stat. 386; and the Act of July 3, 1926, 44 Stat., Part 2, p. 887. See H. Rep. 1358, 69th Cong., 1st Sess., and S. Rep. 1177, 69th Cong., 1st Sess. on H. R. 12495 which became the Act of 1926.

the same was true upon each of the occasions of its reenactment.¹⁵

In *Kent v. Dulles*, *supra*, this Court held that familiar principles of statutory construction with respect to statutes impairing constitutional rights forbade the expansion of 22 U. S. C. 211a to include the denial of passports for political reasons—this despite a long history of executive claims to absolute discretion and despite the frequent denial of passports to individuals for personal and political reasons.¹⁶

Precisely the same principles prohibit the expansion of the same statute to include area restrictions. Here again, exercise of “the law-making functions of the Congress” (*Kent v. Dulles*, *supra*, at 129) is required before area restrictions can be upheld. And these functions must be exercised in such a manner as to give the Executive the guiding benefit of clear Congressional standards (*ibid.*). To suggest, as did Judge Clarie below, that there must be “considerable discretion and elbow room” in “dealing with foreign affairs” (R. 45), is to disregard the fact that the statute has no standards at all. It also assumes incorrectly that restrictions upon a citizen’s travel may be subsumed under the heading of foreign affairs. See *infra*, pp. 39-45.

Further, a construction of Section 211a which would import into it the power to impose area restrictions would make the statute unconstitutional because its “limits are

¹⁵ On none of these occasions, 1856, 1902 and 1926, was a passport required for lawful departure from and entry into the United States since the border control statutes, *infra*, pp. 31-39, were not in effect on those dates. See *Kent v. Dulles*, 357 U. S. 116, 123-124. A passport was an advantage for citizens because it gave “authentic proof of their national character,” Dep’t of State, *op. cit.*, *supra*, at 169. It was not until the First World War that other countries began the practice of requiring passports for the entry of foreigners. See *Kent v. Dulles*, 357 U. S. 116, 121, 123.

¹⁶ See Executive Order 7856, March 31, 1938, 3 F. R. 799, App. *infra*, p. 62, and the dissenting opinion in *Kent v. Dulles*, 357 U. S. 116, 131-132.

so vague and undefined" (Circuit Judge Smith, R. 57). The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Company*, 269 U. S. 385, 391; see also *Small v. American Sugar Refining Company*, 267 U. S. 233, 238-240. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Cramp v. Bd. of Public Instruction*, 368 U. S. 278; *Burstyn v. Wilson*, 343 U. S. 495; *Winters v. New York*, 333 U. S. 507; *Niemotko v. Maryland*, 340 U. S. 268; *Kunz v. New York*, 340 U. S. 290.

In addition, 22 U. S. C. 211a, as construed and applied by the Secretary and by the Attorney General in his criminal prosecutions under 8 U. S. C. 1185, has become a penal statute. This, under the decisions of the Court, is an additional reason for requiring a narrow construction. *Commissioner of Internal Revenue v. Acker*, 361 U. S. 87, 91; *Smith v. United States*, 360 U. S. 1, 9; *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284; 296.¹⁷

The Court has told us that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred", *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315.

In *Kent* this principle was applied to the broad claims of executive discretion made by the Secretary and, indeed, supported by the unambiguous language of Executive Order

¹⁷ It may be that for the same reasons which Judge Bazelon urged in his dissenting opinion in *Briehl v. Dulles*, 248 F. 2d 561, 579, rev'd *sub nom. Kent v. Dulles*, 357 U. S. 116, the Secretary's construction of Section 211a and his regulations conflict with the Congressional policy as set forth in the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, favoring freedom of expatriation. See *Savorgnan v. United States*, 338 U. S. 491, 498-9.

7856. What the Court said there is equally applicable here:

"The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that 'No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.' 32 Stat. 386, 22 U. S. C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.

The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." 357 U. S. at 127-128.

There is even less reason here than in *Kent* to find a jelling of an enforceable administrative prohibition of travel to particular areas. In making this observation, we do not suggest that in the absence of clear statutory language authorizing area restrictions, a runaway exercise of executive "discretion" would be permitted to override the intent of Congress.

There is nothing in the Secretary's behavior prior to the Act of 1926 which Congress may be said to have adopted in its passage of 22 U. S. C. 211a. Each of the few instances of restricted passports occurred in wartime, and in none is there any indication that the restriction represented a prohibition upon travel or, more to the point, a prohibition whose violation would have criminal consequences.¹⁸

¹⁸ In another pending case involving the right to travel to Cuba, the Secretary has given four instances of such restrictions in the entire history of the country prior to the Act of 1926 in the following language:

"During the Civil War Secretary Seward prohibited the travel to Europe by citizens going 'on errands hostile and injurious to the peace of the country and dangerous to the Union'. (3 Moore, [International Law Digest (1906)], 920.)

During World War I, early in 1915, the Department of State passed a restriction on the issuance of passports for Belgium because of famine conditions there. (3 Hackworth, [Digest of International Law (1942)], 526.)

In 1919 the Department of State prohibited unnecessary travel from the United States to Europe before peace had been declared, and further because of existing shortage of food and over-taxing of transportation and other facilities on the continent. (*Id.*, at 529-530.)

During the same year the Secretary did not authorize issuance or endorsement of passports for Germany. No objection, however, was interposed to the entry into Germany of Americans who had important and urgent business to transact there. (*Id.*, at 530.)" (Brief of the Government in *MacEwan v. Rusk*, C. A. 3d, No. 14920, p. 25, n. 18.)

These very few instances, all distinguishable from the instant case, are also reviewed in *Freedom to Travel*, Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York (1958), pp. 14-18, 50-58.

The Secretary's actions subsequent to the passage of the Act of 1926 cannot, of course, authorize a rewriting of the statute. However, in the various restrictions imposed by the Secretary after 1926, there was again no claim that travel was prohibited and certainly no attempted criminal prosecution, although numerous persons, including a United States Senator, travelled to countries outside the scope of their passport coverage.¹⁹

Indeed, on May 1, 1952 the Department of State issued a press release in which it announced:

"This passport is not valid for travel to [specified countries] unless specifically endorsed under authority of the Department of State as being valid for such travel."²⁰

At the same time, the Department stated that this was *not* a travel prohibition:

"In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized."

¹⁹ See, e.g., *Report of the Commission on Government Security Pursuant to Public Law 304*, 84th Cong. (1957), p. 472; *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957) (herein called Senate Hearings, 1957), pp. 23-24, 26, 30-31, 55, 71; *Hearings before the Senate Committee on Foreign Relations on Passport Legislation*, S. 2770, S. 3998, S. 4110, and S. 4137, 85th Cong. 2d Sess. (1958) (herein called Senate Hearings, 1958), pp. 38, 163, 196.

²⁰ Press release No. 341 quoted in *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 40-41, and noted in Senate Hearings, 1957, *op. cit.* p. 40.

The Association of the Bar of the City of New York in discussing this press release²¹ states:

"This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Freedom to Travel—Report of the Special Committee to Study Passport Procedures* (1958), p. 70.

"The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." *Ibid.*

There is other evidence of the absence of such authority. The various restrictions imposed by the Secretary do not appear to have been predicated upon a claim of authority under Section 211a. The Department has been significantly unwilling to answer the inquiries of Congressional committees as to its power to prohibit travel to particular areas.²² In our entire history as a nation, there was not a single prosecution of an American citizen for violation of area restrictions until 1963 when four students were indicted for conspiracy to violate 8 U. S. C. 1185 by inducing

²¹ The Department's efforts to reinterpret this release have not been very persuasive. See Senate Hearings, 1957, *op. cit.*, pp. 40-41, 78; Senate Hearings, 1958, *op. cit.*, pp. 12-13. Sometimes the Department has expressed the view that "geographic abuses" would result in the denial of future passports, Senate Hearings, 1958, *op. cit.*, p. 26. Elsewhere its representatives have expressed some doubt as to whether a violation of the regulations is a violation of the Passport Laws. See, *e.g.*, Senate Hearings, 1957, *op. cit.*, pp. 31, 59.

²² See the Senate Hearings, 1957, *op. cit.*, at pp. 14-15, 40-41, and particularly the Committee's view that the Department was "not responsive," *id.* at 78, a view repeated by Senator J. W. Fulbright, Senate Hearings, 1958, *op. cit.*, pp. 12-13.

travel to Cuba, *United States v. Laub, et al.* (E. D. N. Y., Cr. Nos. 63-425 and 64-137).²³

The lack of executive power has been repeatedly demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel. In 1957, the *Report of the Commission on Government Security* expressly recommended the amendment of 8 U. S. C. 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid" (S. Doc. 64, 85th Cong. (1957) 475). Then, following the *Kent* decision, the President asked Congress for "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives * * *" (H. Doc. No. 417, 85th Cong., 2d Sess.). This was not a routine request. It was made formally and explicitly because of the Court's decision in the *Kent* case. The President's request was embodied in a bill which was followed by numerous similar bills in the last six years.²⁴ It is very significant that Congress consistently failed to adopt

²³ This was followed by a second indictment of nine persons for a similar conspiracy, *United States v. Laub, et al.* (E. D. N. Y., Cr. No. 64-350). William Worthy, the American newspaperman who was prosecuted for returning to the United States from Cuba without any passport, *Worthy v. United States*, 338 F. 2d 386 (C. A. 5, 1964), had never been prosecuted for his prior travel to China; see *Worthy v. Herter*, 270 F. 2d 905, cert. den. 361 U. S. 918. The only other prosecution, also a recent one, is based upon travel to Cuba without any passport, *United States v. Travis* (S. D. Calif., No. 32380-C.D., appeal pending, C. A. 9th).

²⁴ See, e.g., 85th Cong., 1st Sess.: S. 2770, H.R. 8655; 85th Cong., 2d Sess.: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87th Cong., 1st Sess.: H.R. 388, 935, 1086, 2485; 88th Cong., 1st Sess.: H.R. 2559, 8652.

these proposals. Similar recommendations were made by the House Committee on Un-American Activities (see, e.g., H. Rep. No. 53, 85th Cong., 1st Sess., p. 56 (1957)) to no avail. As Mr. Justice Frankfurter has said, " . . . [t]his practical construction of the Act by those entrusted with its administration is reenforced by the [Administration's] unsuccessful attempt to secure from Congress an express grant of authority . . . ", *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352.

2. THE IMMIGRATION AND NATIONALITY ACT OF 1952

We turn next to Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185 (1952). This statute in its language, purpose, legislative history and implementation likewise has nothing whatever to do with area restrictions. It is a border-control statute; the conditions necessary for its invocation have not occurred; and to construe it to authorize area restrictions would raise serious constitutional problems.

The statute provides that in time of war or national emergency proclaimed by the President, he may make it "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter the United States unless he bears a valid passport" (App. *infra*, pp. 59-60). It also contains restrictions upon the entry and departure of aliens.

We treat of this statute *in extenso* because it was relied upon by the government in its answer (R. 8) and by Judge Clarie in his memorandum of decision (R. 37). However, the statute is not cited as authority for the area restrictions imposed by Public Notice 179, 26 F. R. 492 (App. *infra*, p. 68) or by Departmental Regulation 108.456, 26 F. R. 482, amending 22 CFR 53.3(b) (App. *infra*, pp. 66-67). Indeed, Judge Blumenfeld viewed the area restrictions under attack as "promulgated under § 211(a)" (R. 62) and stated that "the defendant expressly

disclaims reliance upon [8 U. S. C. 1185] here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

The legislative history of this statute and of its two predecessors, the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252, indicates that it was a war measure intended to seal off the borders of the United States by requiring passports of American citizens for entry to and departure from the United States, and by requiring permission for aliens similarly desiring to cross the borders of the United States.

(a) *The original border control statute, the Act of May 22, 1918.*

The Act of 1918 was a war measure directed at such crimes as espionage by restricting the entry to and departure from the United States of aliens and citizens.²⁵ The House Foreign Affairs Committee, which added the section relating to the travel of citizens,²⁶ explained the bill as follows (H. Rep. 485, 65th Cong., 2d Sess., pp. 2-3):

"The bill is intended to stop an important gap in the war legislation of the United States. * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents

• ²⁵ It was suggested by President Woodrow Wilson in his Address to Congress on December 4, 1917, where he emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." As the Committee on Foreign Affairs of the House of Representatives pointed out: "The Attorney General in his report for 1917 made a similar recommendation. The Department of Justice proceeded to draft the bill now under discussion, which was referred to and received the approval of all the other executive departments interested in the matters to which it relates. It was introduced in Congress on February 26, 1918." (H. Rep. 485, 65th Cong., 2d Sess., p. 2.)

²⁶ See 56 Cong. Rec. 6029.

instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive department have power to curb the general departure and entry of travelers.

New legislation is the only remedy. * * *

* * * It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined. * * *

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious

departures for Cuba which it was impossible to prevent. Other individual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes.

*** Your committee were also of the opinion that the bill is, and therefore reported it as, an emergency war measure."

The bill was limited to war and required a Presidential finding concerning "the public safety" to justify the prohibition of entry into and departure from the United States without permission (56 Cong. Rec. 6029).²⁷ Mr. Flood, its principal spokesman, emphasized the fact that it was a war measure intended "to control ingress and egress from this country" (56 Cong. Rec. 6029). A principal purpose, in his view, was to prevent "traitors [from getting] the chance to come back and spy on our military operations" (56 Cong. Rec. 6064). The record is replete with references to "suspects", "traitors" and "suspected spies" (56 Cong. Rec. 6031, 6064, 6067). When it was suggested that they could be criminally prosecuted if permitted to enter, he responded that because there were difficulties of proof "these are people who ought to be now out of the country and kept out until the war ends" (56 Cong. Rec. 6066). Mr. Flood added that all nations at war "have found it necessary to control travel to and from their countries" and that "Germany has * * * closed its borders entirely" (56 Cong. Rec. 6067).²⁸

²⁷ "Mr. Moore of Pennsylvania: The gentleman advances this as a war measure and puts it on that ground?"

Mr. Flood: Absolutely. It is limited to the duration of the war." (56 Cong. Rec. 6030.)

²⁸ There were numerous references to border control and no references whatever to the imposition of area restrictions. It was understood that passports would not be required for the crossing of the Canadian-American border because of the inconvenience of a passport system to American citizens working in Canada. See e.g. 56 Cong. Rec. 6192.

In the Senate, its Judiciary Committee also pointed out that the "danger of transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers" (S. Rep. No. 431, 65th Cong., 2d Sess., p. 2).²⁹ Mr. Shields, spokesman for the bill, described it as "a supplement to the espionage acts" (56 Cong. Rec. 6191) and said: "The object of it is to control the entry and departure of all persons in or from their territory. It is a war measure and in line with the legislation that has been enacted by all the nations engaged in the war" (56 Cong. Rec. 6191). The debate in the Senate emphasized that the bill "authorizes prevention of departure and entry" and that it was a "war measure" (see 56 Cong. Rec. 6191, 6192, 6194, 6248).

The executive implementation of the Act of 1918 shows no imposition of area restrictions.³⁰ While the controls as to aliens were continued (40 Stat. 559) since the statute was effective only in war time, the controls terminated on March 3, 1921 (H. Res. No. 64, 41 Stat. 1359, *et seq.*).

(b) *The Amendment of June 21, 1941*

In 1941, during World War II, after President Franklin D. Roosevelt had proclaimed an unlimited national emergency,³¹ Congress amended the 1918 statute to provide,

²⁹ The Committee said with respect to a particular citizen that "not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so." (*Ibid.*, p. 3.)

³⁰ See Executive Order No. 2932, *For. Rel.*, 1918, Supp. 2, 815, for the implementing regulations. The history of those regulations and their operation during World War I, is set forth in 2 Hyde, *International Law Chiefly As Interpreted and Applied By the United States* (1945), pp. 1202-1206. See also, the *Hearings on The Extension of Passport Control. Hearings before the Committee on Foreign Affairs of the House of Representatives*, 69th Cong., 1st Sess. (1919).

³¹ Proclamation No. 2487, May 27, 1941, 55 Stat. 1647.

inter alia, that the Act could be invoked during the then existing emergency.³² The legislative history of that statute showed that its purpose was the same as that of its predecessor (S. Rep. 444, 77th Cong., pp. 1-2). The pertinent Senate Report stated:

"During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. * * * Since the Act of May 22, 1918, was the subject of considerable litigation and consequently has been construed in a number of respects by the courts of the United States, it seems particularly desirable that the act be amended rather than that new legislation be enacted. * * * " (S. Rep. 444, 77th Cong. p. 2)

Again the debates were unequivocal concerning the purpose of the bill and the intended manner of its operation. In the House, Congressman Bloom made reference to "a law that prevents aliens and citizens from departing or entering this country during the time this country is at war" (87 Cong. Rec. 5048). Mr. Dickstein said that "this bill distinctly speaks of a person entering and going." (*Ibid.*). Mr. Luther A. Johnson added:

" * * * The sole purpose of this legislation is to give that same power that this Government had during the World War, and have a sort of clearing house where people entering or leaving this country would have to give their reasons why they were going or

³² Act of June 21, 1941, 55 Stat. 252.

coming, and where it would be determined whether they are engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States. * * * [They] would have to go to the State Department and state why they were coming in or going out and secure an entrance or exit permit." (87 Cong. Rec. 5052)³³

The debate in the Senate was along the same lines (87 Cong. Rec. 5325-5326, 5387-5389).³⁴ The significant new element in the Senate debate was Senator Taft's insistence "that the bill should be confined to the present emergency" (87 Cong. Rec. 5386) because it affected a basic liberty. He said that "when in effect we delegate legislative powers to the President, such powers should be confined to the particular emergency for which we are asked to delegate them; and when the emergency is over they should terminate." *Ibid.* Senator La Follette supported Senator Taft's amendment

³³ See the letter of Mrs. Ruth B. Shipley, Director of the Passport Division of the State Department, which discussed the need for legislation "providing for the centralization of control over the entry into and departure from the United States of persons of all classes" (87 Cong. Rec. 5048). The following remarks are typical and relevant:

"Mr. Bloom. * * * This would prevent a person, like Fritz Kuhn, or anybody else, from leaving the country if we wanted to keep him here." (87 Cong. Rec. 5049).

Mr. Johnson described the evidence before the House Committee in this way:

"It was stated that there were a number of incidents occurring in the enforcement of espionage laws which revealed the necessity for this law so they could effectively keep check on parties under suspicion and whose activities stamped them as enemies of our Government" (87 Cong. Rec. 5052; see also 87 Cong. Rec. 5047-5053, 5416).

³⁴ Senator Van Nuys, the principal proponent of the bill, pointed out that "the main objective is to reach certain elements of aliens" (87 Cong. Rec. 5325). He stated that "there is more espionage and subversive activities in the United States today than at any previous time in our history" (87 Cong. Rec. 5386). Senator Taft referred to "travel over the borders of the United States." (*Ibid.*)

(87 Cong. Rec. 5387) and the bill was eventually limited, so far as citizens are concerned, to "the existence of the national emergency proclaimed by the President on May 27, 1941"; it was agreed to in that form by the House (87 Cong. Rec. 5416). The Taft Amendment is relevant to any consideration of the wartime purpose of this series of statutes. It also has a bearing upon the constitutional problem (*infra*, pp. 45-55).

The 1941 statute was invoked by the President less than a month before Pearl Harbor.³⁵ It was implemented by regulations of the Secretary of State requiring passports for entry and departure and not imposing area restrictions.³⁶ Congress continued the statutory provisions in effect until April 1, 1953.³⁷

c) *The present statute*

In 1952 Congress repealed the 1918 statute as amended, the act of June 21, 1941, 55 Stat. 252, amending it only so as to make the provisions subject to invocation during "any national emergency proclaimed by the President . . ." (66 Stat. 190). It is obvious that the basic purpose of the 1952 statute is the same as that of its two predecessors in view of the absence of additional legislative history and the statement in the House report that the statutory provisions "are incorporated in the bill [Sec. 215] in practically the same form as they now appear in the Act of May 22, 1918 (40 Stat. 559)" (H. Rep. 1365, 82d Cong., 2d Sess., p. 53). See also *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541. In other words, the statute is a wartime measure imposing

³⁵ Proclamation No. 2523, November 14, 1941, 55 Stat. 1696.

³⁶ Departmental Order 1003, 6 F. R. 6069. These regulations were amended by Departmental Regulation 11, August 27, 1945, 10 F. R. 11046, and now appear in 22 CFR Part 53.

³⁷ 66 Stat. 54, 57, 96, 137, 330, 333.

controls over the departure and entry of aliens and citizens because of the danger of their committing criminal acts affecting the national defense.³⁸

The administrative implementation of this statute of 1952 likewise supports the narrow construction required by the Court in the *Kent* case for constitutional reasons. On January 17, 1953, the President promulgated Proclamation 3004, 67 Stat. C31, significantly entitled, "Control of Persons Leaving or Entering the United States by the President of the United States of America" (App. *infra*, pp. 63-66). The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued "in the interests of the United States" (App. *infra*, p. 64). The regulations of the Secretary relating to departure and entry which had been issued in 1941 were expressly incorporated, as amended, in the Proclamation (App. *infra*, pp. 64-66). Neither the Proclamation nor the regulations do more than impose restrictions upon the departure from or entry into the United States.

If more were necessary to limit the statute to its original intendment, it may be found in a number of other sources. Thus, in its brief in *Kent*, in discussing the right to restrict passports against use in certain parts of the world,

³⁸ As the Solicitor General correctly points out in his brief in *Kent v. Dulles*, *supra*, pp. 55-56:

"In short, the intended control of departure and entry³⁶ was to be carried out by the denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed 'contrary to the public safety' in the context of the war or emergency which required the invocation of the restrictions."

³⁶ The 1918 statute (40 Stat. 559) was entitled 'An Act to prevent in time of war departure from or entry into the United States contrary to the public safety' (emphasis added).

the Government correctly pointed out: "But this restriction would carry no sanctions, since the statute now makes it unlawful only 'to depart from or enter' the country *without a lawful passport*."³⁹ And in none of its many appearances before Congressional committees has the Department of State relied upon this statute as substantive authority for area restrictions.⁴⁰

We have already referred to its press release of 1952 (*supra*, p. 27) in which the Department indicated that it was not claiming the right to prohibit travel to so-called "restricted" areas (*supra, ibid.*), and to the view of distinguished commentators with respect to this admission (*supra*, p. 28). It is also significant that many of the bills which sought to give the power to impose area restrictions to the Secretary of State were in the form of proposed amendments to 8 U. S. C. 1185. As we have seen, such an amendment was never adopted by the Congress.

The conclusion is inescapable that 8 U. S. C. 1185 means precisely what it says. It is a form of border control and it does not authorize the Secretary to impose area restrictions.

POINT III

The President does not possess, nor has he exercised, an inherent executive power to prevent the travel of American citizens to a particular country.

A. The Court below did not uphold the claim of inherent Executive power.

While the Secretary had asserted in his answer an inherent executive right to control travel under the foreign affairs power (R. 8), the Court below held that the Secre-

³⁹ Brief for respondent, *Kent & Briehl v. Dulles*, Oct. Term, 1957, No. 481, p. 56, n. 57 (italics the Government's).

⁴⁰ See, e.g., the Senate Hearings, 1957, and 1958, *op. cit.*, *passim*.

tary's ban upon travel to Cuba was authorized, not by an inherent executive power, but by statute. Thus, in the principal opinion, District Judge Clarie stated:

"The issue in this case is whether or not geographical restrictions imposed by the Secretary of State in respect to travel to Cuba are authorized by Congressional act and if so are these statutes which purport to grant such authority repugnant to constitutional limitations." (R. 37; see also R. 39)

Circuit Judge Smith, dissenting, agreed that the majority of the Court did not "adopt the approach of the District of Columbia Court of Appeals in *Worthy v. Herter*, 270 F. 2d 905 (1959), *cert. denied*, 361 U. S. 918 (1959), which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs" (R. 55). "*Kent v. Dulles*," Judge Smith added, "implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad" (R. 55).

Judge Blumenthal held that the Secretary's authority was predicated upon a single statute, 22 U. S. C. 211a (R. 63), and he added that "the defendant expressly disclaims reliance upon [8 U. S. C. 1185] here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

Nevertheless, we address ourselves briefly to the point, since it was the *raison d'être* of the decision of the District of Columbia Court of Appeals in the *Worthy* case⁴¹ and

⁴¹ *Worthy v. Herter*, 270 F. 2d 905, *certiorari denied*, 361 U. S. 918. The special distinguishing factors in the situation relating to China which undoubtedly affected the Court of Appeals have been set forth by the Department in the Senate Hearings, 1957, *op. cit.*, pp. 4-5, 21-22, 25, 27, 68-69.

the partial basis for a district court opinion in another Cuban travel case.⁴²

B. There is no such inherent power.

In *Kent v. Dulles*, *supra*, the Court held that the right to travel is a liberty "of which a citizen cannot be deprived without due process of law" (357 U. S. at 125). Such due process includes as a minimum the exercise of "the law-making functions of the Congress" (*id.* at 129).

The Court's decision stands for the proposition that there is no inherent executive power to control the travel of an American citizen. Indeed, the Court went farther in *Kent* when it indicated the strict conditions under which such law-making power might be exercised through delegated powers (*ibid.*). And in the subsequent case of *Aptheker v. The Secretary of State*, 378 U. S. 500, even the exercise of power by the Congress was stricken as an unconstitutional interference with the constitutional liberty of travel.

The unequivocal statement of the Court in *Kent* followed a similar ruling of the Attorney General many years ago (see H. Rep. 485, 65th Cong., 2nd Sess., p. 2) and an even earlier statement by President Jefferson that the Executive power does not include "the prerogative powers * * * of retaining within the State, or recalling to it any citizen thereof * * * except so far as he may be authorized from time to time by the legislature to exercise any of those powers." Jefferson's Writings, Ford's Ed., 1894, Vol. III, p. 155.⁴³

It has been asserted elsewhere that restrictions upon the travel of American citizens raise political questions justifying the exercise of an inherent executive power over

⁴² *MacEwan v. Rusk*, — F. Supp. — (E. D. Pa.) now pending on appeal, C. A. 3, No. 14920.

⁴³ For an example of the necessity for legislative action, see *Blackmer v. United States*, 284 U. S. 421.

foreign affairs.⁴⁴ On the contrary, in *Kent* the Court made it clear that passports were outside the scope of "political questions" because despite "some implication of intention to extend the bearer diplomatic protection" (357 U. S. at 129), the passport's "crucial function today is control over exit" and "the right to exit is a personal right included within the word 'liberty' as used in the Fifth Amendment" (*ibid.*). It was in that connection that the Court said, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress" (*ibid.*).

The President's great powers to wage war and conduct foreign relations do not authorize him to dispose in his discretion of the private rights of citizens under the foreign affairs power. He cannot authorize a general confiscation of enemy property. *Mitchell v. Harmony*, 13 How. (54 U. S.) 115. See also *Brown v. United States*, 8 Cranch (12 U. S.) 110. It is Congress, not the President, which can declare embargoes. See Wright, *The Control of American Foreign Relations* (1922), 301-303.

In *Briehl v. Dulles*, 101 U. S. App. D. C. 239, 278, 248 F. 2d 561, 588 *et seq.*, reversed *sub nom. Kent v. Dulles*, *supra*, Judge (now Chief Judge) Bazelon in a dissenting opinion joined in by Chief Judge Edgerton analyzed the Government's foreign relations claims and pointed out that "those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments" (at p. 589). Each of the instances cited by Judge Bazelon is distinguishable from restrictions upon a citizen's liberty of travel.

The lack of executive power is admitted by the language of the Department's Press Release No. 341 of May 1, 1952

⁴⁴ *Worthy v. Herter*, *supra*, n. 41.

to which we have previously referred, *supra*, p. 27. It has been demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel, *supra*, pp. 29-30. The significance of the attempt and of its failure has already been discussed in our consideration of the statutory problem, *supra*, p. 29, and is equally persuasive on the issue of inherent power. See *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352.

C. The President did not exercise any inherent power over travel in the instant case.

The President has neither asserted the power to impose area restrictions nor has he exercised it with respect to travel in Cuba. The President's last relevant action appears in Proclamation 3004, January 17, 1953, 67 Stat. C31, directing that passports be required for departure and entry to countries other than those in the Western Hemisphere. The proclamation says nothing whatsoever about area restrictions; it does not require even a passport for travel to Cuba. It was the Department of State which, in January, 1961, established this requirement of a passport for travel to Cuba.

The authority in Proclamation 3004 to the Secretary "to revoke, modify or amend such regulations as he may find the interest of the United States to require" is a reference to 22 CFR Part 53. That part of the regulations describes the instances in which a passport is required for entry and departure, but it does not ban travel to a particular area.

It is true that Executive Order 7856 authorizes the Secretary in his discretion "to restrict the passport for use only in certain countries." But it was the same Executive order which authorized the Secretary in his discretion to refuse to issue a passport (App., *infra*, p. 62)

which was held insufficient in *Kent* to give such authority to the Secretary.⁴⁵

The claim of delegation is rendered even weaker in the instant case, since it was not the Secretary, but a Deputy Under Secretary of State, who imposed the ban on travel to Cuba (App., *infra*, p. 68). 5 U. S. C. 156 (App., *infra*, p. 61), is equally inapposite to the present case. That statute gives administrative authority to the Secretary; it does not authorize him to make determinations of policy affecting the basic rights of American citizens.⁴⁶ As this Court said in *Greene v. McElroy*, 360 U. S. 474, 496:

“ * * * the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him

⁴⁵ The history of such discretion to refuse a passport is, of course, much more extensive than the practice of limiting it to particular areas. See, e.g., Executive Order No. 2119-A, January 12, 1915 (reprinted in For. Rel., 1915, Supp., 902); Executive Order No. 2286-A, December 17, 1915 (reprinted in For. Rel., 1915, Supp., 912); Executive Order No. 2362-A, April 17, 1961 (reprinted in For. Rel., 1916, Supp., 787); Executive Order No. 2519-A, January 24, 1917 (reprinted in For. Rel., 1917, Supp., 1, 573); Executive Order No. 4382-A, February 12, 1926 (reprinted in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947* (1926), 69th Cong., 1st Sess., pp. 19-25); Executive Order No. 4800, January 31, 1928; Executive Order No. 5860, June 22, 1932; Executive Order No. 7856, March 31, 1938, 3 F. R. 799, 22 CFR 51.75.

⁴⁶ Judge Bazelon's discussion in his dissenting opinion in the *Briehl* case of the Government's claim of delegation under Executive Order 7856 is apposite here. *Briehl v. Dulles*, 248 U. S. 561, reversed *sub nom. Kent v. Dulles*, 357 U. S. 116. His reference there to the Secretary's authority to determine when a passport is required was not, of course, an expression of view that the Secretary could ban travel to particular areas; that issue was not litigated. The kind of administrative authority intended to be given to the Secretary, i.e. "administrative rules" is indicated in the testimony of Assistant Secretary of State Carr on the bill which became the Act of 1926. *Hearings before the House Committee on Foreign Affairs, H. R. 11497, 69th Cong., 1st Sess. (1926)*, pp. 5-6.

such a power; rather, it is whether either the President or Congress exercised such a power"

The authority of administrators to make "decisions of great constitutional import" (*Greene v. McElroy, supra*, at 507) must be demonstrated by "explicit action" (*ibid.*). The instant case presents the impermissible combination of a serious impairment of constitutional liberty by an administrator whose authority cannot possibly be described as "explicit".

D. Conclusion.

The claim of inherent Executive power is untenable because it is inconsistent with this Court's view in *Kent v. Dulles, supra*; it has traditionally been disavowed by the Executive branch; and it is inconsistent with the efforts to secure empowering legislation. The restrictions themselves make no claim of inherent authority but explicitly rely upon claimed statutory authority, and the restrictions were not made by the President but by an official in the Department of State.

IV

The Secretary's actions violate appellant's constitutional liberty of movement.

A. The Secretary's actions are admittedly an interference with "freedom to travel" which this Court has described as "an important aspect of the citizen's 'liberty.'" *Kent v. Dulles*, 357 U. S. 116, 127. They interfere not only with the physical mobility of the individual but with a right which this Court has described as "deeply ingrained in our history" (357 U. S. at 126), "as close to the heart of the individual as the joys of what he eats, or wears or reads" (357 at 127) and "basic in our scheme of values" (*ibid.*). The opinion in *Kent* emphasized the "large social

values" of such travel (*ibid.*) and quoted from Professor Chafee's statement that:

"Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions 'at home.'" [*Three Human Rights in the Constitution*, 162, at 195-196]. (357 U. S. at 126-127).

These were some of the considerations which led this Court in *Kent* to indicate that only in rare circumstances could even Congress interfere with this liberty of movement. The Court significantly described the regulations under the 1918 and 1941 statutes (*supra*, pp. 31-37) as "war measures" (357 U. S. at 128) and said: "We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power" (*ibid.*).

The constitutional test of urgent necessity was suggested by this Court when it said:

"In a case of comparable magnitude, *Korematsu v. United States*, 323 U. S. 214, 218, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of 'the gravest imminent danger to the public safety.' There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional

right of the citizen has been made here." (357 U. S. at 128) ⁴⁷

In *Kent* that test was held to require a statutory construction—under which the Secretary was not given the power to control travel. In *Aptheker* the importance of the constitutional guarantee led the Court to declare unconstitutional (for reasons not directly applicable here) even a clear congressional statute.

B. The United States was not at war in 1961 when the State Department imposed this ban upon travel to Cuba, nor is it at war with Cuba today. There is no more a "showing of extremity" here than there was in 1958 when *Kent* was decided. On the contrary, the "chamber of horrors" offered by the Secretary in *Kent* ⁴⁸ to show the danger to national security of travel by Communists renders almost miniscule his arguments in this case. Indeed, we do not understand that the Secretary makes any claim that the restrictions here were under the war power, and that there was any danger to the public safety, much less one that is either grave or imminent (357 U. S. at 128).

The Public Notice restricting travel to Cuba refers only to "the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans

⁴⁷ The Secretary's claim of "authority to be the final judge as to which American citizen can go to which countries abroad, and for what purposes" has been described by Senator Fulbright as "extraordinary power". Senate Hearings, 1958, *op. cit.*, p. 13; President Eisenhower approved such interference only "in terms of overriding requirements of our national security." Senate Hearings, 1958, p. 164. The Association of the Bar of the City of New York, which has recommended legislative authority for geographic restrictions believed them justified only in cases of "exceptional gravity." Senate Hearings, 1959, p. 105.

⁴⁸ See Brief for the Solicitor General in *Kent v. Dulles*, Oct. Term 1957, No. 481, pp. 60-64.

visiting Cuba." This is far from the national danger which would justify the interference with the constitutional right of an American to travel.

The breach in diplomatic relations occurred in January, 1961, in response to the Cuban Government's insistence on a reduction in the size of the staff of the American Embassy in Havana. 44 Dept. of State Bull. 103, 104. There was no indication then or thereafter of any inability on the part of so powerful a country as the United States "to extend normal protective services to Americans visiting Cuba", (App. *infra*, p. 69). Indeed, the very suggestion is belied by the succeeding statement in the same press release of January 16, 1961 that "exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or business men with previously established business interests" (*ibid.*). The breach has not resulted in any inability to protect American citizens since the Swiss Government, which now occupies the building of the American Embassy in Havana, is actively engaged in the representation of American interests.⁴⁹

Nor can it be said that any unusual protection has been found necessary for American visitors to Havana, who have included newspaper, radio and television representatives, dramatists, architects, physicians and even chess players at international chess tournaments—all of whom came to, resided in and departed from Cuba in complete safety.⁵⁰

As the Association of the Bar Committee has said, "it seems clear that the existence of diplomatic relations does not necessarily improve the ability of a country to protect

⁴⁹ See 44 Dept. of State Bull. 103 (1961).

⁵⁰ The same point of the Government's responsibility for protection has been urged by the Government elsewhere. In the Court of Appeals Judge Bazelon pointed out in his dissenting opinion that there was no enforceable right to protection. *Briehl v. Dulles*, 248 F. 2d 561, rev'd *sub nom. Kent & Briehl v. Dulles*, 357 U. S. 116.

its citizens in another country.”⁵¹ Indeed, since 1961 there have been more arrests of American citizens in the Communist countries of Europe with which the United States has diplomatic relations than have occurred in Cuba.⁵² Further, as the Association points out “the Department has not consistently invalidated passports for travel to countries with unrecognized regimes.”⁵³

C. The opinion below does not treat precisely with the constitutional issue under discussion here. There is a footnote reference to the Congressional resolution of October 3, 1962 (76 Stat. 697), which, of course, was subsequent to the travel ban and related to a different matter which was disposed of by means quite different than the interference with the travel of American citizens (R. 47).

There is reference to the Declaration of Costa Rica, in which the Foreign Ministers of some Central American Republics agreed to recommend to their governments “that they adopt, *within the limitations of their respective constitutional provisions*, measures to put into effect immediately, to prohibit, restrict and discourage the movement of their nationals to and from Cuba” (emphasis added) (R. 48). In the court below and in the *MacEwan* case, the Secretary argued that the State Department wishes to discourage travel between the South American countries and Cuba; that it is not concerned with danger to the United States, but possible danger to those Latin American countries; and that the United States cannot consistently urge these countries to ban travel to Cuba while permitting American citizens to go there.

⁵¹ *Freedom to Travel*, *op. cit.*, *supra*, n. 18.

⁵² The United States Government has not sought to impose area restrictions even where there have been unlawful arrests. Senate Hearings, 1957, *op. cit.*, p. 16.

⁵³ *Freedom to Travel*, *op. cit.*, p. 53; see also Senate Hearings, 1957, *op. cit.*, pp. 16, 26, 67, 112-113, 116-117. Of course, the Government of Cuba is still recognized by the United States, since severance of diplomatic relations is not a withdrawal of recognition. Lauterpacht, *Recognition in International Law*, 354-355 (1954).

In short, the Secretary proposes to curtail the rights of American citizens in order to furnish a good example to other countries in the hemisphere. It is submitted that this is to turn American citizens into instruments of foreign policy⁵⁴ and that it is a constitutionally impermissible reason for imposing restrictions upon liberty of movement.

The Secretary's actions represent a return to the vague standard of "the best interests of the United States" (App., *infra*, p. 69), which constituted his passport policy for a decade until it was declared unlawful by this Court in *Kent*.⁵⁵

The travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies. *Comment*, 61 Yale L. J. 171, at 191. See e.g., the remark of Senator Allen J. Ellender that the impressions he gained "on a trip abroad" differ sharply from those received from the State Department (New York Times, September 5, 1955, p. 4, col. 3).⁵⁶

⁵⁴ For criticisms of this concept of the American citizen as an instrument of foreign policy see Senate Hearings, 1957, *op. cit.*, pp. 87, 91, 104, and Senate Hearings, 1958, *op. cit.*, pp. 137, 142, *et seq.*

⁵⁵ See the discussion in *Freedom to Travel*, *passim*, *op. cit.*, and in Petitioner's Brief in *Kent v. Dulles*, Oct. Term 1957, No. 481, pp. 42, *et seq.*

⁵⁶ See also the statements on the subject in the Senate Hearings, 1957, by the then Senator Hubert M. Humphrey (pp. 27-29), by former Asst. Secretary of State Edward W. Barrett (p. 14) and by J. R. Wiggins, Executive Editor of the Washington Post (p. 101), and in the Senate Hearings, 1958, by Joseph N. Welch (p. 165) and by Henry Steele Commager (p. 167).

District Judge Wyzanski has brilliantly assimilated travel to the exchange of ideas and experiences protected by the First Amendment:

"This travel does not differ from any other exercise of the manifold freedoms of expression; from the right to speak, to write, to use the mails, to publish, to assemble, to petition. In all these liberties the principal element is the stretching of the mind to accommodate the growing spirit." (Wyzanski, *Freedom to Travel*, Atlantic Monthly, Oct. 1952, 66, 68)⁵⁷

Our experience with China has indicated the danger to the democratic process in closing off all means of communication and observation between the nationals of the two countries. It is a travesty that the principal articles and books on China which have appeared in this country were written not by Americans but by the nationals of other countries which permit them to travel to China.⁵⁸ We have improved the situation slightly by allowing journalists and businessmen to go to Cuba, but that does not meet the more important problem of allowing the citizen, except in time of actual war, to see for himself what is happening in other countries.⁵⁹

There is in fact no national emergency with respect to Cuba or one which has any connection with the travel ban. Since only Judge Clarie below was of the opinion that 8 U. S. C. 1185 was a basis for the regulations, only he made reference to the Presidential Proclamations of December 16, 1950 and January 17, 1953 (R. 40). Those proclamations may or may not justify the requirement of a passport as a form of border surveillance or control. They

⁵⁷ See also the recognition of the First Amendment's dependence upon freedom to travel in *Freedom to Travel*, *op. cit.*, pp. 35, *et seq.*

⁵⁸ See Senate Hearings, 1957, pp. 22, 29.

⁵⁹ See Editorial, Saturday Evening Post, Nov. 14, 1964, p. 86.

certainly are not the equivalent of a finding that there is an emergency requiring a prohibition of travel to Cuba.

The Court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists. It has the authority to inquire whether there is in fact such a national emergency in existence today which can support this restriction upon civil liberty. In *Chastleton Corp. v. Sinclair*, 264 U. S. 543, Mr. Justice Holmes stated with respect to an emergency declaration by a legislature that

" * * * [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed * * *." (*Id.* at 547-548)

In that case, the Court held that, had the case revolved about the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as subsequently re-enacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank v. Hahn*, 326 U. S. 230, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Moratorium Law, distinguished *Chastleton* as dealing with "quite a different situation." (*Id.* at 235.) The difference lay in

the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

"The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts * * *." (*Id.* at 234-235); see also *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 433.

No such "reconsideration" by either Congress or the President has occurred in the instant situation.

In *Woods v. Miller*, 333 U. S. 138, 147, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied, however, "that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit, in a recent opinion upholding the judicial power to look behind a Presidential declaration of national emergency relating to possession of gold bullion, made an observation even more striking in its applicability to personal liberties:

"It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course, if it seems essential to continue the subject matter of these criminal regulations now,

Congress can so declare. But the power lies in Congress." *Bauer v. United States*, 244 F. 2d 794, 797 (C. A. 9, 1957).

Judge Blumenfeld, of course, did not rely upon these proclamations because, in his view, 8 U. S. C. 1185 was not applicable (R. 67). Indeed, he expressly disavowed the view that danger to the public safety was a criterion, and said that "the right to travel is probably subject to a reasonable prohibition on travel to a particular foreign country which our Government believes to be so unfriendly to this nation as to require the severance of diplomatic relations with it" (R. 66).

The premise underlying this statement is incorrect in view of the varied considerations that induce a breach of diplomatic relations. Judge Blumenfeld was also in error in stating that "the State Department predicts that such travel might provoke international situations which would necessitate negotiations (22 U. S. C. 1732 (1958)), with a government whose existence the United States is committed to ignore" (R. 66). There has been no such prediction by the State Department, negotiations between the two countries go on frequently through such intermediaries as the Czechoslovak and Swiss Ambassadors, and the United States recognizes the Government of Cuba rather than ignores its existence. *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 406.⁶⁰

The United States is the only democratic country which, to our knowledge, imposes area restrictions upon the travel of its citizens. Logically, there is no difference between this type of restraint upon travel outside the country and restrictions which South Africa has adopted upon liberty of movement within that country. We do not, of course, equate the actions of the two countries. But it is well to remind ourselves of the danger of the "best inter-

⁶⁰ See Lauterpacht, *op. cit.*

ests" rule relied upon by the Secretary herein as he did in *Kent, supra*, to restrain the basic liberty of movement. The Convention on Human Rights of the United Nations has set forth the principles of liberty of movement which underlie this case:

"(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and return to his country."⁶¹

V

The action was improperly dismissed as to the Attorney General.

The Court below was unanimous in dismissing the complaint against the Attorney General (R. 68-69). Judges Clarie and Blumenfeld did so upon the ground that the Secretary's restrictions were valid (R. 46, 67), Judge Smith on the ground that the relief sought was premature (R. 57). If the Secretary's restrictions are invalid for any of the reasons presented above, the court below was in error in dismissing the complaint in view of its allegations as to the Attorney General's conduct.

Thus, the complaint alleged that the Attorney General had power to regulate the departures from the United States (R. 1); the Government's denial (R. 7) is in conflict with the existing practice of border control by the Immigration and Naturalization Service of the Department of Justice.

The complaint alleged that the Attorney General had instituted a criminal prosecution of another person for entering the United States from Cuba without a passport

⁶¹ United Nations Department of Public Information, Universal Declaration of Human Rights (1949), Article 13, S. Doc. 123, 81st Cong., 1st Sess., 1156.

(R. 3); this was admitted by the Attorney General (R. 8). Thereafter, other American citizens were indicted either for travel to and from Cuba without a passport or without one specifically endorsed for such travel.⁶²

The complaint also alleged that the restrictions and sanctions imposed by the two defendants had caused common carriers to refuse to carry United States citizens and had caused foreign governments to refuse to permit departure of American citizens for Cuba (R. 3). While there is a formal denial (R. 8), it is at least qualified by the Declaration of Costa Rica (R. 47-48) and by other agreements relied upon by the Government below.

The declaratory judgment procedure was intended to be a substitute, under circumstances such as these, for criminal prosecutions. See Borchard, *Declaratory Judgments*, 2nd ed. 1941, pp. 906, 1920-1921; S. Rep. 1005, 73rd Cong. 2d Sess., pp. 2-3, on the bill which later became the Declaratory Judgment Act. The report quotes with approval as underlying the purpose of the Act this Court's language in *Terrace v. Thompson*, 263 U. S. 197, 216:

"They are not obligated to take the risk of prosecution, fines and imprisonment and loss of property in order to secure a judgment of their rights."

See also Borchard, *Challenging Penal Statutes by Declaratory Action*, 53 Yale L. J. 445, 461 (1943).

The prematurity argument of Circuit Judge Smith (R. 57) is made more doubtful by the increasing number of criminal prosecutions since that opinion was rendered.

As a practical matter, of course, a decision against the Secretary which would hold his attempted exercise of power unlawful would be obeyed by the Attorney General. Nevertheless, since this case is here for review, it is an appropriate occasion for the Court's determination of the issue for the benefit of future litigants.

⁶² See the cases cited in n. 23, *supra*.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Dated, December 4, 1964.

APPENDIX

Statutes, Proclamations, Executive Orders and Regulations

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. 211a provides, in pertinent part, as follows:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185 provides, in pertinent part, as follows:

TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

- (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and

orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or

enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both: and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals; or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or

forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

3. 5 U. S. C. § 156 R. S. § 202 provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.

4. 22 U. S. C. 1732 R. S. § 2001 provides as follows:

Release of citizens imprisoned by foreign governments

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as

practicable be communicated by the President to Congress.

5. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F. R. 799 as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

6. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

7. The pertinent portions of the Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United

States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of

title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof

the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

8. The pertinent portions of the regulations issued by the Secretary of State as found in Part 53 of Title 22 of the Code of Federal Regulations are:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

American Citizens and Nationals

§ 53.1 *Definition of the term "United States"*. The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel*. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2*. No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part; if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also*, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided*, That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is \$25.

§ 53.5 *Prevention of departure from or entry into the United States.*

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.*

§ 53.8 *Discretionary exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

9. Public Notice 179, 26 F. R. 492, promulgated on January 16, 1961 provides:

"DEPARTMENT OF STATE

[Public Notice 179]

**United States Citizens
Restrictions on Travel to or in Cuba**

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration."

10. Press Release No. 24 issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

JAN 9 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL,

Appellant,

—v.—

DEAN RUSK, Secretary of State, *et al.*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
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INDEX

	PAGE
Statement	1
Argument	2
I. Congress has not authorized refusal of pass- ports to visit Cuba	2
II. The President has not exercised, and does not possess, independent constitutional authority to ban travel to Cuba	6
III. The ban on appellant's travel to Cuba is un- constitutional	8
CONCLUSION	10

TABLE OF AUTHORITIES:

Cases:

Aptheker v. Secretary of State, 378 U. S. 500	2, 8
Frank v. Herter, 269 F. 2d 245, cert. den. 361 U. S. 918 ..	2
Kent v. Dulles, 357 U. S. 116	2, 3, 5, 7, 10
Porter v. Herter, 278 F. 2d 280, cert. den. 361 U. S. 918 ..	2
Worthy v. Herter, 270 F. 2d 905, cert. den. 361 U. S. 918	2, 6
Worthy v. United States, 328 F. 2d 386 (C. A. 5)	2, 4
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 ..	7

Constitution:

Article II, §2	7
First Amendment	9
Fifth Amendment	7, 9

Statutes:

8 U. S. C. §1185, Sec. 215 of the Immigration and Nationality Act	3, 6
22 U. S. C. §211a, Sec. 1 of the Act of July 3, 1926, c. 772, §1, 44 Stat. Part 2, 887	3, 6
22 U. S. C. §1732	8
40 Stat. 559, Act of May 22, 1918	3
41 Stat. 1359, March 3, 1921	3
R. S. 4075, Act of August 18, 1856, 11 Stat. 52, 60-61	3
104 Cong. Rec. 1832	5

Proclamation:

Presidential Proclamation No. 3004 of January 17, 1953, 67 Stat. c. 31	4, 5, 6
---	---------

Executive Order:

Executive Order No. 7856, 3 F. R. 799, March 31, 1938	6
--	---

Regulations:

22 C. F. R. 51.75	4, 6
22 C. F. R. 53.1-53.9	4
22 C. F. R. 661	6
22 C. F. R. Part 53	6
26 F. R. 492	4

IN THE
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**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Statement

The American Civil Liberties Union, a non-partisan organization devoted to the protection of the civil liberties granted in the Bill of Rights, respectfully submits its views on the related questions of whether Congress or the President authorized the Secretary of State to prohibit travel to Cuba and whether, if authorized, the prohibition on its face and applied to appellant violates the First and Fifth Amendments.¹

¹ Letters from the parties consenting to the filing of this brief, have been filed with the Clerk of the Court.

Argument

In view of what the Court has already stated about the constitutional basis of every citizen's right to travel abroad (*Kent v. Dulles*, 357 U. S. 116 and *Aptheker v. Secretary of State*, 378 U. S. 500), any extended discussion of the importance of the right to travel seems unnecessary. It is sufficient, as a basis for the argument that follows, only to take notice of the increasing importance of travel abroad as a means of individual self-education and enjoyment. Foreign travel by United States citizens is constantly increasing. The day of the occasional traveler to strange places or the grand tour of Europe for the affluent has been replaced by mass travel for education, vacation and commerce. This increasing exercise of a constitutional liberty cannot be curtailed by the Department of State in the absence of express legislation which is within constitutional limits.

I.

Congress has not authorized refusal of passports to visit Cuba.

The two Judges below who ruled that the area restriction was authorized by Congress did not agree on its statutory source. District Judge Clarie appears to have relied on both the 1926 and 1952 Acts. District Judge Blumenfeld relied on the 1926 Act alone and viewed the 1952 Act as not undertaking to create passport disqualification limitations (R. 66-67).²

² The Court of Appeals for the District of Columbia Circuit considered the question of Congressional authorization of the area restrictions in *Porter v. Herter*, 278 F. 2d 280; *Worthy v. Herter*, 270 F. 2d 905; and *Frank v. Herter*, 269 F. 2d 245. Certiorari was denied in these cases. 361 U. S. 918. See also *Worthy v. United States*, 328 F. 2d 386 (C. A. 5).

A. *The 1926 Act.*—Section 1 of the Act of July 3, 1926, c. 772, §1, 44 Stat. Part 2, 887 (22 U. S. C. 211a), merely repeated the provisions of the Act of August 18, 1856, 11 Stat. 52, 60-61, codified in R. S. 4075, terminating the earlier practice of various officials issuing certificates of citizenship (9 Op. Atty. Gen. 350) and provided that:

“The Secretary of State may grant and issue passports and cause passports to be granted, issued and verified in foreign countries * * * under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports.”

The purpose of this statute was to centralize issuance of passports in the Department of State but no authority to withhold passports for use in particular areas is granted or even suggested. Except for wartime restrictions [under the Act of May 22, 1918, 40 Stat. 559, terminating with the end of the emergency on March 3, 1921, 41 Stat. 1359], there was no administrative practice establishing area restrictions which Congress can be said to have adopted in 1926 by providing generally that the Secretary of State, and no other person, “may grant and issue passports”. Up to that time the two recognized categories for refusal of passports involved questions of allegiance or illegal conduct (*Kent v. Dulles*, 357 U. S. at 127).

Here, as in *Kent v. Dulles*, the absence of any legislative history or administrative practice prior to 1926, except the emergency wartime restrictions, prohibits finding any authority in the 1926 Act to establish area restrictions for citizens otherwise entitled to passports.

B. *The 1952 Act.*—Section 215 of the Immigration and Nationality Act (8 U. S. C. §1185) provides for “Travel Control of Aliens and Citizens in Time of War or National

Emergency" and is now in effect under the national emergency proclaimed by Presidential Proclamation No. 3004 of January 17, 1953, 67 Stat. c. 31. Subdivision (b) provides that during the proclaimed emergency it shall be unlawful for a citizen to enter or depart from the United States without a valid passport except as authorized by the President. The purpose of the statute and its predecessors (Acts of May 22, 1918 and June 21, 1941) is to protect the security of our borders in time of war or emergency by requiring permits or passports, unless waived, for all aliens or citizens who wish to enter or depart. Departure or entry if applied for may be refused for sufficient reasons of public security and departure or entry without permit or passport is declared to be criminal conduct (but see *Worthy v. United States*, 238 F. 2d 386).

Nothing in the text or legislative history of the 1952 Act or its predecessors discloses a Congressional intent to authorize imposition of area restrictions upon citizens otherwise eligible for passports who desire to go to foreign places not approved by the Department of State. Presidential Proclamation No. 3004 invoking §215 makes no reference to area restrictions. The prior regulations of the Secretary of State (22 C. F. R. 53.1-53.9)^a incorporated in the proclamation make no reference to area restrictions. As Judge Blumenfeld noted below (R. 66), the Secretary has not relied on §215 for area control authority but rather on the 1926 Act which is the only statute expressly invoked in Public Notice 179, 26 F. R. 492, issued January 16, 1961, restricting travel to Cuba.

^a The present §53.8 of the regulations, added in 1958 as a cautious reservation, provides that these regulations pursuant to the 1952 Act shall not be construed to prevent exercise of discretion to restrict use of passports to certain countries referred to in §51.75.

Moreover, §215 does not make it an offense to travel to a prohibited area without a passport valid for that area. Congress presumably would have done so if it had authorized area restrictions as well as prohibiting entry or departure without a passport.

C. *Relevant Factors After 1952.*—An additional weighty consideration against construing either the 1926 Act or 1952 Act as authorizing area restrictions is Congress' steadfast refusal to grant this authority although expressly urged to do so. Immediately following this Court's decision in *Kent v. Dulles* on June 16, 1958, President Eisenhower on July 7, 1958 in a message to Congress (104 Cong. Rec. 1832) recommended that the Secretary of State be given clear statutory authority to exclude designated areas from permitted foreign travel. Many bills have been introduced to obtain such authority (e.g. S. 2287 introduced by Senator Fullbright in the 86th Cong., 1st Sess.) but no action has been taken. This is surely persuasive evidence that Congress has not granted the requested authority.

Finally, judicial approval of the claimed general authority over areas of foreign travel would permit extensive exercise of that authority without the restraint or guidance which would be provided by Congress in any specific grant. Absent such a specific grant of authority and the legislative standards which would properly accompany the grant and limit its exercise, the Court should not determine that Congress by a general grant of authority to issue passports has sanctioned, without any legislative standards, area restrictions on the constitutional right of foreign travel. Consideration of the constitutional questions inescapably involved in legislative restraint of personal liberty should be postponed until Congress has acted specifically with all the relevant considerations before it. This case, as *Kent*

v. *Dulles, supra*, calls for application of the rule that constitutionally dubious constructions of Acts of Congress will be avoided.

II.

The President has not exercised, and does not possess, independent constitutional authority to ban travel to Cuba.

Although the two opinions below upholding the ban on travel to Cuba do not rely on executive authority apart from statute, the government's answer invoked "the inherent power of the executive over foreign affairs" (R. 8) also discussed in *Worthy v. Herter, supra*. It is submitted that several considerations forbid the conclusion that the area restriction is a valid exercise of the power of the Executive to deal with foreign affairs.

A. Executive Power Not Invoked.—The passport regulations of the President (Executive Order No. 7856, 3 F. R. 799, March 31, 1938, now contained in 22 C.F.R. 661, Passports, Subpart A—Regulations of the President) which recite that they are based upon 22 U. S. C. 211a, provide that passports shall be granted by the Secretary of State "under such rules as the President shall designate and prescribe for and on behalf of the United States . . .". Thus it appears that the President's passport regulations (including §51.75 authorizing the Secretary to restrict a passport's use in certain countries) are based on the general statutory authority of the 1926 Act, rather than

* 22 C. F. R. Part 53—"Travel Control of Citizens and Nationals in Time of War or National Emergency" recites as authority §215 of the 1952 Act (8 U. S. C. 1185) and deals with departure from or entry into the United States.

on any inherent Executive power to provide such regulations. Since there has been some Congressional action in this area, though only a general authority to grant passports under Presidential regulations, it should require a very clear showing, which is absent here, that the President also exercised inherent Executive power to issue the same regulations instead of requesting further legislative authority if that already granted was thought insufficient. To base the Presidential regulations on the 1926 Act excludes any attempt to base them also upon inherent Executive power at least in the absence of an explicit assertion by the President in the regulations that executive power was being exercised.

B. *Executive Power Non-Existent.*—In *Kent v. Dulles*, *supra*, this Court not only determined that freedom of foreign travel is included within the liberty guaranteed by the Fifth Amendment, but also ruled that if that liberty is to be regulated “it must be pursuant to the law-making functions of the Congress”, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, in which the nature and extent of the executive power granted by the Constitution was fully expounded in several opinions. Thus this Court has already rejected the contention that refusal of a passport is an exercise of Executive power. The Court distinguished the attempted restriction, as here, on a constitutional liberty of an individual citizen from the wholly different situation “dealing with political questions entrusted to the Chief Executive by the Constitution” such as representing the United States in dealing with foreign powers generally, or in the exercise of specific constitutional powers to make treaties with the concurrence of two-thirds of the Senators present, or to appoint ambassadors with the advice and consent of the Senate (Article II, §2).

The President's role in representing the nation in the conduct of foreign relations cannot be transmuted into a constitutional power to abridge the exercise of a personal liberty which itself is granted by the Constitution. Any judicial accommodation of governmental power over foreign affairs to the constitutional liberty of individual foreign travel must take into account the dominant constitutional role of Congress in regulating commerce with foreign nations, declaring war, and generally establishing the policies which govern the external as well as the internal affairs of the nation. The judiciary must require the dominant legislative power to be exercised before determining whether or not it intrudes unconstitutionally upon the individual liberty of foreign travel. It is submitted that there is no executive power alone granted by the Constitution which authorizes curtailment of the liberty to travel granted by the Constitution.

III.

The ban on appellant's travel to Cuba is unconstitutional.

Denial of a passport valid for Cuba, if authorized, is unconstitutional because no sufficient public interest is shown to warrant this curtailment of the constitutional liberty of movement. *Aptheker v. Secretary of State*, *supra*. Two of the judges below who held that the area restriction was authorized and thus reached the constitutional question, stated that the ban was a reasonable and constitutional means to prevent our citizens from becoming involved in "international incidents" (R. 66) on the territory of a nation with which we have severed diplomatic relations and which might require some governmental action to assure the safety of our citizens (22 U. S. C. §1732). Of course, a citizen traveling abroad may be

come involved in an incident resulting in his imprisonment, whether or not the foreign government involved is recognized by the United States. But even in the absence of diplomatic relations peaceful avenues of protest are available through third governments, such as the Swiss government in the case of the United States and Cuba, and other methods short of war are available to the United States through its diplomatic and economic power to secure justice for a citizen unjustly imprisoned. The possibility that the lack of diplomatic relations will impede negotiations in the exceptional case of a citizen unjustly imprisoned is not sufficient reason to restrict the constitutional liberty of all prospective travelers to Cuba. All travel cannot be banned because of the possibility that one or a few might be unjustly imprisoned. Constitutional liberty is too precious to be suppressed because of official fears of embarrassment or inconvenience in the course of its exercise.

This judicial justification for the ban is too insubstantial to be the real reason behind the prohibition. The practical basis for the prohibition apparently is the desire of the Department of State to discourage communication with Cuba by citizens of the United States and other countries as part of our foreign policy. Obviously our foreign policy in respect to Cuba lawfully affects individual interests insofar as it limits trade with Cuba. But here the interest affected is not merely commercial but the liberty of personal movement protected by both the First and Fifth Amendments, and no public interest is shown to justify the suppression of the constitutional right of personal travel to Cuba.

Finally, the statutory authority relied upon constitutes an unconstitutional delegation of legislative power to the President and the Secretary of State because no discernible

standard for its exercise is expressed. *Kent v. Dulles, supra*, at 129. The 1926 Act, which merely provides that the Secretary of State may grant and issue passports under such rules as the President shall designate, does not supply any standard for the regulation here involved. Even the most liberal application of the constitutional rule prohibiting delegation of legislative power is not satisfied, and for this separate reason the prohibition on travel to Cuba is unconstitutional.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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INDEX

Opinion below.....	Page 1
Jurisdiction.....	1
Questions presented.....	2
Statutes, proclamations, executive orders, and regulations involved.....	2
Statement.....	2
Summary of Argument.....	5
Argument:	
I. The case should be remanded for want of jurisdiction.....	13
II. The order of the Secretary of State restricting the issuance of passports to Cuba is a duly authorized and constitutional instrument of foreign policy--	21
A. The restrictions upon travel to Cuba imposed under the order of the Secretary are vital instruments of the foreign policy of the United States.....	21
1. The Cuban threat to the security of American republics.....	22
2. American policy towards the threat of infiltration and subver- sion of American republics.....	27
3. The restriction on travel to Cuba plays an important part in isolat- ing Cuba.....	35
B. The Secretary has been authorized to re- strict travel to particular areas, such as Cuba, pursuant to the needs of the foreign policy of the United States.....	38
1. The Executive Branch, by virtue of its inherent power over foreign relations and the Passport Act of 1926, has authority to refuse pass- ports for particular areas and to limit the countries for which a passport is valid, as required by the necessities of international relations.....	38

II

Argument—Continued

The order of the Secretary, etc.—Continued

B. The Secretary, etc.—Continued

2. Section 215 of the Immigration and Nationality Act confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof.....

Page
56

3. The authority to withhold passports valid for Cuba and thus to prohibit travel to the island has been properly exercised.....

62

III. The restriction limiting travel to Cuba does not infringe any of appellant's constitutional rights.....

66

A. The restraint on travel to Cuba does not violate the constitutional right to travel.....

66

1. The right to travel is subject to reasonable regulation.....

66

2. The restriction on travel to Cuba is reasonably and integrally related to the conduct of United States foreign policy.....

68

B. The statute authorizing the restraint on travel to Cuba is not unconstitutionally vague.....

74

C. The Passport Act does not involve an invalid delegation of power by Congress to the Executive Branch.....

75

Conclusion.....

78

Appendix.....

79

CITATIONS

Cases:

Allen v. Grand Central Aircraft Co., 347 U.S. 535 49

American Sumatra T. Corp. v. Securities and Exchange Commission, 110 F. 2d 117..... 76

Aptheker v. Secretary of State, 378 U.S. 500 21, 72, 73

Bauer v. Acheson, 106 F. Supp. 445..... 21, 68, 72

Board of Trade of Kansas City v. Milligan, 90 F. 2d 855..... 77

Bolling v. Sharpe, 347 U.S. 497..... 66

Boudin v. Dulles, 235 F. 2d 532..... 21

III

Cases—Continued

	Page
<i>Bransford, Ex Parte</i> , 310 U.S. 354.....	19
<i>Briehl v. Dulles</i> , 248 F. 2d 561, reversed <i>sub. nom.</i>	
<i>Kent v. Dulles</i> , 357 U.S. 116.....	21, 62, 64
<i>Brown v. Roofers & Waterproofers Union</i> , 86 F. Supp.	
50.....	21
<i>Chicago & Southern Air Lines, Inc. v. Waterman</i>	
<i>Steamship Corp.</i> , 333 U.S. 103.....	38, 43, 75
<i>Coffman v. Breeze Corporation</i> , 323 U.S. 316.....	15
<i>Copeland v. Secretary of State</i> , 226 F. Supp. 20, va-	
cated and remanded, 378 U.S. 588.....	21
<i>Costanzo v. Tillinghast</i> , 287 U.S. 341.....	49
<i>Cramp v. Board of Public Instruction</i> , 368 U.S. 278....	74
<i>Dayton v. Dulles</i> , 357 U.S. 144.....	21
<i>Douglas v. City of Jeannette</i> , 319 U.S. 157.....	77
<i>Frank v. Herter</i> , 269 F. 2d 245, certiorari denied, 361	
U.S. 918.....	21, 41, 42, 61
<i>Giordenello v. United States</i> , 357 U.S. 480.....	65
<i>Hynes v. Grimes Packing Co.</i> , 337 U.S. 86.....	77
<i>Inland Waterways Corp. v. Young</i> , 309 U.S. 517.....	50
<i>International Ladies' Garment Workers Union v. Don-</i>	
<i>nelly</i> , 304 U.S. 243.....	14
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> ,	
341 U.S. 123.....	67
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495.....	74
<i>Kent v. Dulles</i> , 357 U.S. 116.....	7, 11, 12, 20,
	21, 22, 53, 54, 66, 67, 68, 72
<i>Latvian State Cargo & Passenger S. S. Line v.</i>	
<i>McGrath</i> , 188 F. 2d 1000.....	39, 41
<i>Louisville & N. R. Co. v. United States</i> , 282 U.S. 740..	49
<i>Ludecke v. Watkins</i> , 335 U.S. 160.....	63
<i>MacEwan v. Rusk</i> , 228 F. Supp. 306.....	11, 21, 42,
	60, 61, 62, 63, 68
<i>Maret, The</i> , 145 F. 2d 431.....	39, 41
<i>Martin v. Struthers</i> , 319 U.S. 141.....	74
<i>Mayer v. Rusk</i> , 224 F. Supp. 929, vacated and re-	
manded, 378 U.S. 579.....	21
<i>Moyer v. Peabody</i> , 212 U.S. 78.....	67
<i>National Labor Relations Board v. Gullett Gin Co.</i> ,	
340 U.S. 361.....	49
<i>Norwegian Nitrogen Co. v. United States</i> , 288 U.S. 294..	49
<i>Oklahoma Gas and Electric Co. v. Oklahoma Packing</i>	
<i>Co.</i> , 292 U.S. 386.....	13

Cases—Continued

	Page
<i>Ozanic v. United States</i> , 188 F. 2d 228.....	40
<i>Parker v. Lester</i> , 98 F. Supp. 300, appeal dismissed, 191 F. 2d 1020.....	21
<i>Phillips v. United States</i> , 312 U.S. 246.....	13, 14, 19
<i>Pocket Veto Case, The</i> , 279 U.S. 655.....	50
<i>Porter v. Herter</i> , 278 F. 2d 280, certiorari denied, 361 U.S. 918.....	42, 62
<i>Prendergast v. United States</i> , 314 U.S. 574.....	13
<i>Ray v. Blair</i> , 343 U.S. 214.....	50
<i>Richmond Hosiery Mills v. Camp</i> , 74 F. 2d 20.....	77
<i>Robeson v. Dulles</i> , 235 F. 2d 810.....	21
<i>Rorick v. Board of Commissioners</i> , 307 U.S. 208.....	14
<i>Ryan v. Amazon Petroleum Corp.</i> , 71 F. 2d 1.....	77
<i>Swayer, In re</i> , 124 U.S. 200.....	77
<i>Schneider v. Rusk</i> , 372 U.S. 224.....	18
<i>Selective Draft Law Cases</i> , 245 U.S. 366.....	67
<i>Service v. Dulles</i> , 354 U.S. 363.....	49
<i>Shachtman v. Dulles</i> , 225 F. 2d 938.....	63, 68, 72
<i>Sparks v. Melhwood Dairy</i> , 74 F. 2d 695.....	77
<i>Spielman Motor Sales Co. v. Dodge</i> , 295 U.S. 89.....	77
<i>Star-Kist Foods, Inc. v. United States</i> , 275 F. 2d 472.....	43
<i>Terrace v. Thompson</i> , 263 U.S. 197.....	77
<i>United States v. Allocco</i> , 305 F. 2d 704, certiorari de- nied; 371 U.S. 964.....	51
<i>United States v. Belmont</i> , 301 U.S. 324.....	39, 41
<i>United States v. Cerecedo Hermanos y Compania</i> , 209 U.S. 337.....	49, 60
<i>United States v. Curtiss-Wright Corp.</i> , 299 U.S. 304.....	38, 43, 76
<i>United States v. DiRe</i> , 332 U.S. 581.....	65
<i>United States v. Healy</i> , 376 U.S. 75.....	61
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459.....	50, 57
<i>United States v. Pink</i> , 315 U.S. 203.....	38, 39, 40, 41
<i>United States v. Rosenberg</i> , 150 F. 2d 788, certiorari denied, 326 U.S. 752.....	43
<i>Van Dyke v. Geary</i> , 244 U.S. 39.....	50
<i>Watson v. Buck</i> , 313 U.S. 387.....	77
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624.....	67
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171.....	6,
	14, 15, 16, 17, 18

Cases—Continued

	Page
<i>Winters v. New York</i> , 333 U.S. 507.....	74
<i>Worthy v. Herter</i> , 270 F. 2d 905, certiorari denied, 361 U.S. 918.....	21, 41, 42, 61, 63, 67, 68, 71
<i>Worthy v. United States</i> , 328 F. 2d 386.....	68
<i>Yarnell v. Hillsborough Packing Co.</i> , 70 F. 2d 435.....	77
<i>Z. & F. Assets Realization Corp. v. Hull</i> , 114 F. 2d 464, affirmed, 311 U.S. 470.....	40

Constitution and Statutes:

United States Constitution:

Article II.....	41, 43
First Amendment.....	3, 12, 72, 73
Fifth Amendment.....	3, 12, 41, 72
Ninth Amendment.....	3
Tenth Amendment.....	3
Fourteenth Amendment.....	19
Act of Feb. 4, 1815, Sec. 10, 3 Stat. 195.....	44
Act of Aug. 18, 1856, Sec. 23, 11 Stat. 52.....	42
Act of June 14, 1902, 32 Stat. 386.....	45
Act of March 4, 1913, 37 Stat. 1013.....	15
67 Stat. C31.....	60
Act of May 22, 1918, 40 Stat. 559.....	52, 59
Act of June 21, 1941, 55 Stat. 252.....	52, 59
Foreign Aid and Related Agencies Appropriation Act of 1963, 76 Stat. 1165.....	28, 29
Immigration and Nationality Act of 1952, Sec. 215, 66 Stat. 190, 8 U.S.C. 1185.....	3, 4, 10, 11, 15, 16, 18, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 75, 76, 79.
Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a.....	3, 4 9, 10, 11, 12, 15, 18, 38, 41, 42, 45, 46, 49, 51, 52, 53, 54, 58, 62, 64, 74, 75, 76, 77, 79.
Rev. Stat., Secs. 2000-2001 (1878), 22 U.S.C. 1732.....	37, 47
76 Stat. 697.....	29
Subversive Activities Control Act of 1950 (Title I of Internal Security Act), 64 Stat. 987, Sec. 6, 50 U.S.C. 785.....	21
5 U.S.C. 156.....	64
18 U.S.C. 1544.....	52
22 U.S.C. (1940 ed.) 221.....	52
28 U.S.C. 1253.....	13
28 U.S.C. 2281.....	19
28 U.S.C. 2282.....	2, 5, 14, 15, 20
Magna Carta, Articles 41 and 42.....	54

VI

Executive orders, proclamations, and regulations:

Exec. Order No. 2519-A, reprinted in For. Rel.	Page
1917, Supp. 1, 573-----	44
Exec. Order 7856 (22 C.F.R. 51.75)-----	46, 57, 62, 65, 83
Exec. Order 7856, 3 Fed. Reg. 799, 22 C.F.R. 51.76--	64, 83
Exec. Order 10896, 3 C.F.R. (1959-1963 Supp.) 425---	63
Exec. Order 11037, 3 C.F.R. (1959-1963 Supp.) 621---	63
Pres. Proc. 2914 (1950), 64 Stat. A454-----	62, 83
Pres. Proc. 3004 (1953), 67 Stat. C31-----	60, 62, 63, 64, 84
Pres. Proc. 3447, 27 Fed. Reg. 1085-----	28
22 C.F.R. 51.75-51.77-----	66, 83
22 C.F.R. 53.1-53.8-----	87
22 C.F.R. 53.1-53.9-----	60
22 C.F.R. 53.3(b)-----	2, 64
22 C.F.R. (1949 ed.) 53.8-----	60
22 C.F.R. 53.8-----	64
Departmental Order No. 811, 4 Fed. Reg. 3892-----	52
22 Fed. Reg. 10836-----	2
25 Fed. Reg. 6414-----	27
27 Fed. Reg. 2765-----	28
28 Fed. Reg. 6974-----	29
Public Notice 179, 26 Fed. Reg. 492-----	2, 28, 65, 75, 89
Congressional materials:	
Annals of Congress, 6th Cong., col. 613-----	38
<i>Department of State Passport Policies</i> , Hearings before the Senate Committee on Foreign Relations, 85th Cong. 1st Sess.-----	45, 52
<i>Right to Travel</i> , The, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess.-----	48
S. Doc. No. 231, 56th Cong. 2d Sess. (1901)-----	38
United Nations Universal Declaration of Human Rights, S. Doc. 123, 81st Cong. 1st Sess.-----	4, 55
Miscellaneous:	
Ball, <i>U.S. Policy Toward Cuba</i> , Dep't of State Pub. No. 7690 (1964)-----	69
Bishop, <i>International Law</i> (1953)-----	40
Corwin, <i>The President: Office and Powers, 1797-1957</i> (4th rev. ed., 1957)-----	38
<i>Cuba</i> , Dep't of State Pub. No. 7171 (1961)-----	23,
	24, 25, 69

Miscellaneous—Continued

	Page
Davis, <i>Administrative Law Treatise</i> -----	49
Declaration of Central America, 48 Dep't of State Bull. 517 (1963)-----	33
Declaration of San Jose, Costa Rica, Seventh Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/11.7 (1960)-----	26
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24 Dep't of State Bull. 932-----	47
26 Dep't of State Bull. 7-----	47
33 Dep't of State Bull. 777-----	47, 48
34 Dep't of State Bull. 246-----	47
35 Dep't of State Bull. 756-----	48
47 Dep't of State Bull. 598-----	30
47 Dep't of State Bull. 899-----	27
48 Dep't of State Bull. 719-----	31
Dep't of State Press Conference, May 9, 1947-----	47
Establishment of Diplomatic Relations with Union of Soviet Socialist Republics, Dept. of State, East- ern European Series No. 1 (1933)-----	39
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Hart and Wechsler, <i>The Federal Courts and the Fed- eral System</i> -----	77
2 Hyde, <i>International Law</i> (1922)-----	40
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3 Moore, <i>Digest of International Law</i> (1906)-----	44, 48
Press Release No. 24, Dep't of State-----	2, 3, 75, 90
Press Release No. 341, Dep't of State-----	47
Report of the Inter-American Peace Committee, OEA/ Ser. L/III (1962)-----	26
Report of the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consulta- tion of Ministers of Foreign Affairs, OEA/Ser. G/IV (1963)-----	31

VIII

Miscellaneous—Continued

Report of the Investigating Committee appointed by the Council of the OAS, OEA/Ser. G./IV (1964)---	Page 27
Resolution I, Eighth Meeting of Consultation of Min- isters of Foreign Affairs, Final Act, OEA/Ser. C/II.8 (1962)-----	26, 30
Resolution I, Ninth Meeting of Consultation of Min- isters of Foreign Affairs, Final Act, OEA/Ser. F/II.9 (1964)-----	27, 34
Speech of President Johnson at the Associated Press Luncheon, New York City, April 20, 1964-----	29
Stowell, <i>International Law</i> (1931)-----	40

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, APPELLANT

v.

**DEAN RUSK, SECRETARY OF STATE, AND
ROBERT F. KENNEDY, ATTORNEY GENERAL**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT**

BRIEF FOR THE APPELLEES.

OPINION BELOW

The opinion of the district court (R. 32-67) is reported at 228 F. Supp. 65.

JURISDICTION

The judgment of the district court was entered on March 2, 1964 (R. 67), and a notice of appeal was filed on March 17, 1964 (R. 68-69): This Court on October 12, 1964, postponed consideration of the question of jurisdiction until the hearing on the merits (R. 70). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the relief requested by appellant required the convening of a three-judge court under 28 U.S.C. 2282.
2. Whether the Secretary of State is authorized to restrict the travel of United States citizens to Cuba by refusing to issue passports valid for that country.
3. Whether the restriction invades any constitutional right of the appellant.

**STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS, AND
REGULATIONS INVOLVED**

The statutes, proclamations, executive orders, and regulations involved are set out in the Appendix, *infra*, pp. 79-91.

STATEMENT

Prior to 1961, no passport was required for travel in the Western Hemisphere including Cuba. 22 Fed. Reg. 10836. On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. On January 16, 1961, the Department of State eliminated Cuba from the area for which passports were not required (22 C.F.R. 53.3 (b)) and issued Public Notice 179, which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State" (26 Fed. Reg. 492; R. 21). A companion press release (Press Release No. 24) stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as news-

men or businessmen with previously established business interests" (R. 22).

Appellant, a citizen of the United States and holder of a valid passport, applied to the Secretary of State on March 31, 1962, to have his passport validated for travel to Cuba as a tourist (R. 23). The request was denied (R. 23). On October 30, 1962, appellant renewed his request, stating that the "purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen" (R. 30). The renewed request also was denied on the ground that the purpose of appellant's trip did not meet the standards prescribed for such travel in Press Release No. 24 (R. 31).

On December 7, 1962, appellant instituted this action in the United States District Court for the District of Connecticut. In his original and amended (R. 1-6) complaints, he alleged that the Secretary of State's regulation restricting travel to Cuba was unauthorized by statute and deprived appellant of constitutional rights under the First, Fifth, Ninth, and Tenth Amendments of the United States Constitution. The prayer for relief sought a judgment declaring: (1) that appellant was constitutionally entitled to travel to Cuba; (2) that appellant's travel to Cuba would not violate any statutes, regulations, or passport restrictions; (3) that the Secretary of State's regulation restricting travel to Cuba was invalid; (4) that the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 were unconstitutional; (5) that the Secretary of State's refusal

to grant appellant a passport valid for travel to Cuba violated appellant's constitutional rights and rights granted by the United Nations Declaration of Human Rights; and (6) that denial of the passport endorsement without a formal hearing violated appellant's rights under the Fifth Amendment.¹ The complaint also requested that the Secretary of State be directed to validate appellant's passport for travel to Cuba and that the appellees be enjoined from interfering with such travel. In the amended complaint, appellant added to the paragraph which sought a declaration of unconstitutionality regarding the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 a prayer that the appellees be enjoined "from carrying out or enforcing the said statutes, as aforesaid" (R. 5).

On appellant's motion (R. 11), and over the objection of the appellees, a three-judge court was convened. On cross motions for summary judgment, the court, by a divided vote, granted the Secretary of State's motion for summary judgment and dismissed the action against the Attorney General "on the merits" (R. 32-46, 68). One of the members of the three-judge panel, District Judge Blumenfeld, was of the view that the case was not one for a three-judge court because, as he said, "We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations" (R. 60). On the merits, Judges Clarie and Blumenfeld sustained the regulation. Circuit Judge Smith concurred with

¹ This procedural claim was abandoned in the district court and has not been urged here.

Judge Clarie's conclusion that the case was one for a three-judge court but dissented on the merits. His ground was "that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority" (R. 57).

SUMMARY OF ARGUMENT

I

The Court has no jurisdiction to determine, on the merits, the questions presented by this appeal.

Direct appeal is permissible only where a district court of three judges is required under 28 U.S.C. 2282 because the plaintiff seeks an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution." Congress deliberately excluded from Section 2282 suits seeking to enjoin as unconstitutional discretionary regulations issued by an executive official or administrative agency.

The present case falls within the excluded category. The thrust of the complaint is levelled at the directive of the Secretary of State interdicting general travel to Cuba. That appellant's quarrel is with the directive, which was discretionary, is demonstrated by the facts: (1) that appellant would have no cause for complaint if the order had not been issued and the passport withheld and (2) that appellant would secure complete relief if the operation and enforcement of the order were enjoined. The statute neither interdicts travel to Cuba nor directs its interdiction.

The case is governed, therefore, by *William Jameson & Co. v. Morgenthau*, 307 U.S. 171. That appeal was dismissed because (1) the broad challenge to the Federal Alcohol Administration Act upon the ground that only the States could constitutionally regulate commerce in intoxicating liquor raised no substantial constitutional question; and (2) the Court had no jurisdiction to consider upon direct appeal the plaintiffs' further contention that the regulations issued under the statute, and the statute to the extent that it authorized the regulations, should be invalidated as infringements of the plaintiffs' constitutional rights. Similarly, in the present case there is no substantial attack upon the general legislative enactments and no jurisdiction to consider the attack upon the constitutionality of the executive regulation. Nothing is added by a more explicit request for an injunction barring the operation of a statute to the extent that it authorizes the order alleged to invade the plaintiff's constitutional rights.

II

The order of the Secretary of State restricting travel to Cuba by refusing the issuance of passports valid in that area, without which the travel is forbidden by statute, is a duly authorized and constitutional instrument of foreign policy.

Appellant's challenge to the area restriction presents the legal questions (1) whether the Secretary has power to bar the issuance of passports valid for travel to Cuba where the effect of the denial is to

make the travel a crime and (2) whether the restriction invades any of his constitutional rights. In examining those questions, however, the essential nature of the Secretary's order—the true function of the restriction—must be fully understood.

A. This is not a case like *Kent v. Dulles*, 357 U.S. 116, where the Secretary withheld passports from a particular class of citizens because of the nature of their beliefs or associations, and thus barred them from leaving the United States. The order attacked in this case exercises the conventional foreign policy function of suspending travel by the citizens of one country to the realm of another as an instrument of the conduct of foreign relations. The nature of the Castro regime in Cuba and the difficulties between the Castro government and the United States are too well-known to require elaboration. Under existing conditions the refusal to issue passports for Cuba and the consequent restriction of travel serve two vital purposes:

First, travel by U.S. citizens to Cuba in this period of tension could easily result in incidents of the most serious import. In the early days of the Castro regime U.S. citizens were subjected to harassment, arrested without charges, and even put to death. Under present conditions there is no possibility of limiting the risk of such incidents or of dealing with their consequences by normal diplomatic channels. A disastrous international chain of events might all too quickly result from the recurrence of such incidents, even though the U.S. citizens involved had been

informed by the State Department that they entered Cuba at their own risk.

Second, and much more important, the restriction is an essential part of an international program for preventing the Castro regime in Cuba from infiltrating and subverting existing governments in the Western Hemisphere. Travel between Cuba and these nations is important to the active attempts at infiltration and subversion. The United States and other members of the Organization of American States have coordinated their policies and undertaken cooperative measures to prevent unrestricted travel between Cuba and the other American Republics. Were the United States to withdraw from this collective effort, it is doubtful that the present inter-American restrictions on travel could be maintained. If those restrictions were to be relaxed, the opportunities available to the Cuban Government for infiltration and subversion would be greatly increased.

B. The Secretary of State has ample power to limit the areas for which passports will be valid when the necessities of foreign policy so require, even though the limitation operates by express congressional enactment as a restriction upon travel to excluded areas.

The issuance or refusal of passports according to the necessities of international conditions is an integral part of the Executive's inherent responsibility for foreign relations. In international law and diplomacy the suspension of travel to a foreign country is a recognized instrument of foreign policy. But while the constitutional authority of the President is

a sufficient source of the passport power, we need not rely upon it alone because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports, which is most naturally read to include the definition of the areas for which passports shall be issued and those for which, because of the necessities of foreign policy, passports will be withheld. Since the 1926 Act operates in conjunction with the broad and inherent powers of the Executive over foreign affairs, there is no need to distinguish exactly between the statutory and constitutional sources. When Congress enacted the legislation confirming to the President and Secretary broad control over the issuance of passports, it must have contemplated that the authority would, when necessary, be used to suspend the issuance of passports for travel to another country when required by the state of international relations.

It is irrelevant whether the refusal of a passport valid for a specified area would, at all times, have made travel to the area illegal. That was the consequence during our participation in World War I and again from May 27, 1941, until today. As a practical matter the refusal of a valid passport would always operate, save in rare cases, to interdict the travel, and Congress must have appreciated and intended that consequence. In any event, the important point, at this stage of the argument, is that the President and Secretary of State have always had, by the virtue of their inherent power and the Passport Act of 1926 and its predecessors, full authority to limit the areas

for which passports will be issued according to the necessities of our international relations.

Executive practice and the repeated reenactment of earlier legislation indistinguishable from the Passport Act of 1926 confirm our proposition. In practice the President and Secretary, from the Civil War until today, have repeatedly used the authority conferred by the Act of 1926 and its predecessors to interdict travel to specific areas and under various circumstances as part of their conduct of foreign relations. That consistent interpretation would alone be entitled to great weight. Here any possible doubt is allayed by the repeated reenactment of essentially the same statute after the gloss of practice had been impressed upon its words.

All this was before Congress when it declared in Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), that, under certain conditions proclaimed by the President, it should be "unlawful for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid passport." Manifestly, the additional provision was not intended to curtail the existing discretion of the Executive to limit the areas for which passports would be valid, or to refuse passports intended only for travel to the excluded areas, when such travel by U.S. citizens would be inconsistent with pressing international considerations. A similar provision had been in force during and after World War I and from 1941 until 1952. The Act of 1952 took the authority of the Executive over passports as it found it, includ-

ing the power to impose area restrictions, and put behind any passport limitations thus imposed by the Executive the sanction of a legislative prohibition upon travel in violation thereof. Not a word in the 1952 legislation limits the broad control over the issuance and terms of passports previously enjoyed by the Executive under the Passport Act of 1926 and the inherent power over foreign affairs, even though additional legal consequences were made to flow from the Secretary's determinations. Section 215(b) of the 1952 Act, operating in conjunction with the broad and established authority over passports, therefore confirms to the President and Secretary the power to suspend travel to specified areas in times of emergency as the necessities of international relations may require.

Section 215 does not confront the Executive with the bare alternative of either interdicting departure from the United States or allowing travel to any country. "If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power." *MacEwan v. Rusk*, 228 F. Supp. 306, 310 (E.D. Pa.), pending upon appeal to the Third Circuit. Such has been the interpretation of every court to consider the question.

Kent v. Dulles, 357 U.S. 116, is not to the contrary. The refusal to permit any citizen to leave the United States without inquiry into his beliefs and associations, and the denial of the passport necessary to departure if he holds a particular class of views, is ut-

terly unlike a general restriction upon travel by all U.S. citizens to a few specific areas even though narrow exceptions are permitted. Not only does the discrimination against particular associations and beliefs, present in one case and absent from the other, afford an obvious ground of distinction, but the discriminatory interdiction voided in *Kent* had little, if any, relation to foreign policy, whereas the present area restriction serves a vital function in inter-American Affairs. The holding of *Kent* that the Secretary lacks authority to grant or withhold passports at his discretion will not support the conclusion that he may not limit the areas in which a passport is valid as an instrument of foreign policy, as he has done periodically for many years.

III

The restriction upon travel to Cuba, which serves vital national interests in the conduct of foreign policy, invades no constitutional right secured by the First or Fifth Amendment. Freedom of movement, including travel to foreign nations, is most assuredly part of the "liberty" guaranteed by the Fifth Amendment but that liberty is not absolute; it may be reasonably circumscribed if required by other, pressing national interests. A Nation which can conscript citizens for military training and service when international relations so require, cannot be powerless to forbid citizens to travel in particular regions in a similar time of national emergency.

Here the challenged restriction covers a very limited area—Cuba. It is applicable, with narrow exceptions, to all U.S. citizens. It involves no inquiry into beliefs, associations, or even activities; and it raises no danger of invidious discrimination. It is

maintained in cooperation with other American republics as an essential measure for reducing the clear and present danger of subversive attacks by the Castro regime upon Latin American countries and perhaps ultimately upon the United States. The urgency of such cooperation in prophylactic measures short of war is evidenced by the fact that the United States and the Castro regime, backed by the Soviet Union, have already stood, at least once, in the most dangerous confrontation.

Appellant's claims that the legislation authorizing the passport restrictions is unconstitutionally vague and constitutes an unconstitutional delegation of legislative power are without merit.

ARGUMENT

I

THE CASE SHOULD BE REMANDED FOR WANT OF JURISDICTION

A direct appeal to this Court from a district court lies under 28 U.S.C. 1253 only "from an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." This Court has no jurisdiction of the present appeal unless the complaint was required to be heard by a three-judge court. *Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386; *Phillips v. United States*, 312 U.S. 246; *Prendergast v. United States*, 314 U.S. 574. We submit that a three-judge court was not required and that the Court therefore has no jurisdiction. The proper course, under our view,

would be to remand the cause to the district court for a new judgment which would allow appellant to appeal to the court of appeals. *Rorick v. Board of Commissioners*, 307 U.S. 208, 213; *International Ladies' Garment Workers Union v. Donnelly*, 304 U.S. 243, 251-252.

Section 2282 of Title 28 of the United States Code requires impanelling a three-judge court in any case in which the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *." There is a sharp distinction between enjoining the operation of a statute, which requires a three-judge court, and enjoining as unconstitutional the discretionary action of an administrative body or executive officer, for which only a single judge is required. The distinction is made by the very language of Section 2282, for it speaks only of restraining the "operation or execution of any Act of Congress." Where the statute directs the action of the executive or administrative officer, restraint upon his action may be restraint upon operation of the statute itself but that is plainly not the case where, as here, the statute delegates a general authority and the complaint is of a specific executive or administrative order issued pursuant thereto. *William Jameson & Co. v. Morgenthau*, 307 U.S. 171; *Phillips v. United States*, 312 U.S. 246.

Nor can it be supposed that the exclusion of cases seeking to enjoin administrative action from the scope of Section 2282 was unintentional. At one time Sec-

tion 2281, its analogue applicable to State action, was confined to injunctions against the enforcement "of any statute of a State," but by the Act of March 4, 1913, 37 Stat. 1013, Congress added suits to restrain the enforcement "of an order made by an administrative board or commission acting under and pursuant to the statutes of such State." Since Section 2282 was enacted by Congress in 1937 with this language and history before it, the omission of any requirement of a three-judge court in an action to restrain enforcement of an order of a federal officer or agency acting under and pursuant to a federal statute must have been deliberate. See *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173; *Coffman v. Breeze Corporations*, 323 U.S. 316, 317-318, note 1.

It follows that the court below plainly erred in holding that a three-judge court is required wherever the injunction would paralyze "the operation of an entire administrative system" (R. 36). Nor is the importance of the administrative action the test. Congress might have taken those elements into account as apparently it did in Section 2281; it chose, however, to allow single judges to rule upon requests for injunctions to stay the rules or orders issued by federal executive or administrative officials.

It seems equally plain that appellant's complaint seeks only to enjoin executive action and not the enforcement, operation, or execution of an Act of Congress, within the meaning of Section 2282. His request for an injunction restraining the Secretary of State and Attorney General "from carrying out or enforcing" the Passport Act of 1926 and Section 215

of the Immigration and Nationality Act of 1952 does, in form, seek to enjoin the operation of two acts of Congress, but when one looks below the surface, it becomes apparent that the substance of the relief sought is necessarily confined to the operation of the Secretary's directives restricting travel to Cuba. Appellant complains only of the refusal to permit him to travel to Cuba. He is not concerned with travel to other places, with other restrictions upon travel, or with other aspects of the administration of the statutes. Indeed, he would have no standing to challenge them upon the allegations of this complaint.

The restriction upon travel to Cuba is imposed not by any Act of Congress but by the directives issued by the Secretary of State in the exercise of his discretion. Nothing on the face of either statute interdicts travel to Cuba. Nothing in either statute requires or directs the Secretary to interdict such travel. If appellant's constitutional rights have been infringed, it is by the discretionary action of the Secretary, and appellant can be given complete relief by declaring the invalidity of the Secretary's order and enjoining all action under it without reference to the statute. The statutes are only remotely involved—only to the extent that the Secretary assigns either or both as the source of authority for his discretionary action.

William Jameson & Co. v. Morgenthau, 307 U.S. 171, makes it plain that a three-judge court is not required under these circumstances and that this Court has no jurisdiction of the appeal. There the appellants brought an action described in their Statement as to Jurisdiction as "a suit seeking to enjoin

the defendants, temporarily and permanently, from enforcing the provisions of the Federal Alcohol Administration Act and particularly sections 21(k) and 46(a) of Regulations No. 5 issued under the Act on the grounds that (1) the regulations in question are repugnant to the Constitution of the United States and (2) the Federal Alcohol Administration Act is repugnant to the Constitution of the United States" (Jurisdictional Statement in No. 717, October Term 1938, p. 8). The statute was attacked upon the ground that the Twenty-first Amendment vests control over traffic in intoxicating liquors exclusively in the States. The regulations were attacked as unauthorized by the statute and also upon constitutional grounds as delegating power to the British government, as going beyond the commerce power, and as introducing arbitrary classifications. *Id.*, pp. 8-9. The Court held that the general attack upon the entire statute was insubstantial. It refused to rule upon the constitutional and statutory challenges to the regulations because it was not the intention of Congress to allow a direct appeal to this Court "when administrative action and not the Act of Congress is assailed" (307 U.S. at 173-174).

Appellant attempts to brush the *Jameson* decision aside upon the ground that there "no substantial question of constitutional validity was raised" (Appellant's Brief, p. 18); whereas here the constitutional issue is substantial. The Court's finding of insubstantiality, however, applied only to the argument that the federal government had no power to regulate interstate and foreign commerce in intoxicating

liquors. It made no such ruling with respect to the constitutional challenges to the regulations because it held that an attempt to enjoin the enforcement of administrative regulations does not require convening a three-judge court.

Nor can the *Jameson* case be distinguished upon the ground that the plaintiffs in that case challenged only the constitutionality of the regulations whereas the present appellant asserts that if either the Passport Act or Immigration and Nationality Act authorizes the executive restriction upon travel to Cuba, it is unconstitutional. Examination of the complaint in the *Jameson* case makes it plain that, after attacking the regulations upon both statutory and constitutional grounds, the plaintiffs alleged that, if and insofar as the statute were construed to authorize the regulations, the statute was unconstitutional as a wrongful delegation of legislative power and a deprivation of property without due process of law (Record in No. 717, October Term 1938, pp. 16-17).²

² Although appellant attacks the statutes directly on the ground that they are unconstitutionally vague and constitute an unconstitutional delegation of federal power, it is only the Secretary of State's administrative action, not the statutes, which has affected appellant. The statutes did not require the Secretary to restrict travel to Cuba and; if he had not done so, appellant would not have been affected by the statute in any way. Consequently, an injunction against the Secretary's administrative action would fully protect appellant.

In any event, appellant's contentions concerning vagueness and delegation of power are frivolous (see pp. 74-77 below). It is well established that a three-judge court must be convened only if there is a substantial question raised concerning the constitutionality of the statute sought to be enjoined. *E.g.*, *Schneider v. Rusk*, 372 U.S. 224; *William Jameson & Co. v. Morgenthau*, 307 U.S. 171.

To make the requirement of a three-judge court turn upon the presence or absence of such an allegation would wipe out the considered legislative distinction between enjoining the operation of a federal statute and enjoining the operation of an order made pursuant to a federal statute. Wherever an order is attacked as unauthorized by statute and also as a deprivation of constitutional rights, the plaintiff can allege that to the extent that the statute authorizes the order, the statute is unconstitutional and its enforcement should be enjoined.³ To allow a direct appeal to this Court in every case, regardless of whether the allegation was included, would read into the statute some phrase such as "or order made by executive or administrative authority acting under an Act of Congress," which Congress omitted despite the example of Section 2281. Appellant contends that a plaintiff may obtain an injunction against an execu-

³The Court noted the above point in *Phillips v. United States*, 312 U.S. 246, 252, saying "Some constitutional or statutory provision is the ultimate source of all actions by state officials," and the opinion went on to hold that "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority."

Similarly, in *Ex Parte Bransford*, 310 U.S. 354, 359, the Court noted the essential difference between conduct by executive officials under a statutory directive—a challenge to which is a challenge to the statute—and the exercise of power under a statute conferring discretion. Speaking of tax valuations alleged to be discriminatory or confiscatory in violation of the Fourteenth Amendment, the Court said—

Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself.

Accordingly, a three-judge court was not required.

tive or administrative directive from a single judge upon constitutional grounds when he chooses *not* to allege that, if the statute authorizes the action, the statute is to that extent unconstitutional, as in *Kent v. Dulles*, 357 U.S. 116; but that the plaintiff is entitled to a three-judge court whenever, as here, he chooses to include that recital. This would mock congressional policy by allowing the plaintiff to turn Section 2282 on and off at will without regard to either the real nature of the relief sought or the substance of the issues.

Our interpretation conforms to the sense of Section 2282 and the requirements of sound judicial administration. The predicate of Section 2282 is the belief that a single judge should not have power to frustrate by injunction the operation of an enactment approved by the legislative branch in the exercise of its constitutional function. But where the only relief sought is against a particular exercise of executive or administrative power under a general delegation of authority, the court is not frustrating by injunction the operation of a regulatory scheme approved by the legislature and there is no collision between the congressional determination and the judicial decree. The present case is a perfect illustration. Congress did not interdict travel to Cuba or even decide whether, under existing circumstances, such travel should be interdicted. And except for any effect it might have under the doctrine of *stare decisis* the maximum result of appellant's suit can be to enjoin as unconstitutional the enforcement or operation of the order of the Secretary banning travel to Cuba under pres-

ent circumstances, leaving the statutes otherwise untouched.*

II

THE ORDER OF THE SECRETARY OF STATE RESTRICTING THE ISSUANCE OF PASSPORTS TO CUBA IS A DULY AUTHORIZED AND CONSTITUTIONAL INSTRUMENT OF FOREIGN POLICY

A. THE RESTRICTIONS UPON TRAVEL TO CUBA IMPOSED UNDER THE ORDER OF THE SECRETARY ARE VITAL INSTRUMENTS OF THE FOREIGN POLICY OF THE UNITED STATES

Appellant's challenge to the restriction upon travel to Cuba resulting from the Secretary of State's refusal to issue a passport for that area presents two legal

*The conclusion that a three-judge court was not proper is supported by the practice in passport cases involving the discretionary power of the Executive. *Kent v. Dulles*, 357 U.S. 116; *Dayton v. Dulles*, 357 U.S. 144; *Frank v. Herter*, 269 F. 2d 245 (C.A. D.C.); *Worthy v. Herter*, 270 F. 2d 905 (C.A. D.C.); *Briehl v. Dulles*, 248 F. 2d 561 (C.A. D.C.); *Boudin v. Dulles*, 235 F. 2d 532 (C.A. D.C.); *Robeson v. Dulles*, 235 F. 2d 810 (C.A. D.C.); *MacEwan v. Rusk*, 228 F. Supp. 306 (E.D. Pa.), pending on appeal to the Third Circuit; *contra*, *Bauer v. Acheson*, 106 F. Supp. 445 (D. D.C.). See also *Brown v. Roofers & Waterproofers Union*, 86 F. Supp. 50, 56 (N.D. Calif.), and *Parker v. Lester*, 98 F. Supp. 300, 307 (N.D. Calif.), appeal dismissed, 191 F. 2d 1020 (C.A. 9), involving challenges to other administrative actions, in which a one-judge court was held to be proper.

Cases involving the constitutionality of Section 6 of the Subversive Activities Control Act are not in point since there the statute itself prohibited the Secretary of State from issuing passports to members of Communist-action organizations. Since in those cases, the plaintiff was seeking to enjoin the statute and not administrative regulations or practice, three-judge courts were properly convened. *Aptheker v. Secretary of State*, 378 U.S. 500; *Mayer v. Rusk*, 224 F. Supp. 929 (D.D.C.), vacated and remanded, 378 U.S. 579; *Copeland v. Secretary of State*, 226 F. Supp. 20 (S.D. N.Y.), vacated and remanded, 378 U.S. 588.

questions: (1) whether the Secretary has power to bar the issuance of passports valid for travel to Cuba when the effect of the denial is to make the travel a crime and (2) whether the restriction invades any constitutional right. In examining those questions, however, the essential nature of the Secretary's order—the true function of the restriction—must be fully understood.

This is not a case like *Kent v. Dulles*, 357 U.S. 116, where the Secretary withheld passports from a particular class of citizens because of the nature of their beliefs or associations, and thus barred them from leaving the United States. That practice had at best a remote relationship to foreign policy for it was aimed, not at intercourse with a particular country because of the state of international relations, but at a small class of American citizens regardless of international conditions or the country to which they wished to travel. Here, the withholding of passports for travel to Cuba and consequent prohibition upon travel to that island not only results from conditions in that country and the state of relations between Cuba and the United States but it is also an integral and vital part of a foreign policy towards Cuba worked out in conjunction with other American Republics.

1. The Cuban threat to the security of American Republics

The Communist government of Cuba raises a serious threat to the security of American States. First, while Communist Cuba does not now endanger

the United States militarily, it has imperiled our national security in the recent past and could conceivably do so in the future. One need only recall that the most dangerous moments of the post-war nuclear age were brought about by the emplacement of Soviet missiles in Cuba.

Second, Cuba is the only area in the Western Hemisphere controlled by a Communist government. If Communism's efforts there should be successful, other nations not only in Latin America but elsewhere may be tempted to follow its example.

Third, Cuba is actively attempting to overthrow the existing governments of the American Republics and to impose Communist rule upon those nations. It is attempting to interfere with the cooperative efforts of the United States and the other American nations, through the Alliance for Progress and otherwise, to build stable, democratic societies, and to bring about a far-reaching economic and social transformation. As the Department of State said a few years ago, the success of Cuba's policy of subversion would destroy "the authentic and autonomous revolutions of the Americas [and] * * * the whole hope of spreading political liberty, economic development, and social progress through all the republics of the Hemisphere." *Cuba*, Dep't of State Pub. No. 7171, p. 2 (1961).

There is ample evidence demonstrating the threat which Communist Cuba poses to the security of democracy in the Western Hemisphere. The official "White Paper," published by the Department of

State in April 1961, shortly after area restrictions were imposed, described the threat in these terms (*id.* at 25-28):

Under Castro, Cuba has already become a base and staging area for revolutionary activity throughout the continent. In prosecuting the war against the hemisphere, Cuban embassies in Latin American countries work in close collaboration with Iron Curtain diplomatic missions and with the Soviet intelligence services. In addition, Cuban expressions of fealty to the Communist world have provided the Soviet Government a long-sought pretext for threats of direct interventions of its own in the Western Hemisphere. * * *

As Dr. Castro's alliance with international communism has grown close, his determination to export revolution to other American Republics—a determination now affirmed, now denied—has become more fervent. * * *

Cuban interventionism has taken a variety of forms. During 1959 the Castro government aided or supported armed invasions of Panama, Nicaragua, the Dominican Republic, and Haiti. These projects all failed and all invited action by the Organization of American States. In consequence, after 1959 the Castro regime began increasingly to resort to indirect methods. The present strategy of Fidelismo is to provoke revolutionary situations in other republics through indoctrination of selected individuals from other countries, through assistance to revolutionary exiles, through incitement to mass agitation, and through the political and propaganda operations of Cuban

embassies. Cuban diplomats have encouraged local opposition groups, harangued political rallies, distributed inflammatory propaganda, and indulged in a multitude of political assignments beyond the usual call of diplomatic duty. Papers seized in a raid on the Cuban Embassy in Lima in November 1960 display, for example, the extent and variety of clandestine *Fidelista* activities within Peru. Documents made public by the Government of El Salvador on March 12, 1961, appear to establish that large sums of money have been coming into El Salvador through the Cuban Embassy for the purpose of financing pro-Communist student groups plotting the overthrow of the government. The regime is now completing construction of a 100,000-watt radio transmitter to facilitate its propaganda assault on the hemisphere.

Most instances of serious civil disturbance in Latin America in recent months exhibit Cuban influence, if not direct intervention. At the time of the November riots in Venezuela, the government announced the discovery of high-powered transmitting and receiving sets in the possession of Cubans in Caracas. In the following weeks about 50 Cubans were expelled from the country. Similar patterns appear to have existed in troubles in El Salvador, Nicaragua, Panama, Colombia, Bolivia, and Paraguay.

Other American governments, acting through the organs of the inter-American system, have increasingly voiced their concern over Soviet intervention and Cuban subversion. As early as August 1960, the For-

Foreign Ministers of the American Republics, meeting at San Jose, Costa Rica, declared that the acceptance by an American government of extra-continental intervention "endangers American solidarity and security." The Declaration of San Jose, Costa Rica, Seventh Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.7 (1960).

In January 1962, the Inter-American Peace Committee reported that Cuba's connections with the Sino-Soviet bloc were incompatible with inter-American treaties, principles, and standards. Report of the Inter-American Peace Committee, OEA/Ser. L/III, pp. 45-48 (1962). At the end of that month, the Foreign Ministers of the American Republics, meeting in Punta del Este, Uruguay, declared "that the Continental unity and the democratic institutions of the hemisphere are now in danger." Resolution I, Eighth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.8 (1962). Resolution I of the Punta del Este meeting read (*ibid.*):

The Ministers have been able to verify that the subversive offensive of communist governments, their agents and the organizations which they control, has increased in intensity. The purpose of this offensive is the destruction of democratic institutions and the establishment of totalitarian dictatorships at the service of extracontinental powers.

In October 1962, two weeks before the crisis involving Soviet missiles in Cuba, the Foreign Ministers of the American Republics, meeting informally in Washington agreed that the most urgent problem of the

Western Hemisphere was Communist intervention in Cuba for the purpose of converting the island into an armed base for hemispheric penetration and subversion. 47 Dep't of State Bull. 599 (1962).

More recently, a special investigating committee of the Organization of American States verified that Cuba had made a large shipment of arms to Venezuelan insurgents in November 1963. The committee found that Cuba "openly intended to subvert Venezuelan institutions and to overthrow the democratic government of Venezuela through terrorism, sabotage, assault, and guerrilla warfare." Report of the Investigating Committee appointed by the Council of the OAS, OEA/Ser. G./IV (1964). The Foreign Ministers of the American Republics, meeting in Washington in July 1964, condemned "emphatically" the present Government of Cuba "for its acts of aggression and of intervention against the territorial inviolability, the sovereignty, and the political independence of Venezuela." Resolution I, Ninth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. F./II.9 (1964).

2. American policy towards the threat of infiltration and subversion of American Republics

Faced with this threat, the United States has responded in a careful and deliberate manner. The goal has been to isolate Cuba and thus weaken its ability and will to promote subversion.

As early as July 1960, President Eisenhower ordered a cut of 17,000 tons in Cuba's sugar quota. 25 Fed. Reg. 6414. In October 1960, the United

States prohibited exports to Cuba except for non-subsidized food-stuffs, medicine, and medical supplies. Two months later, the Cuban sugar quota was eliminated completely.

Diplomatic and consular relations with Cuba were terminated on January 3, 1961. Thirteen days later, the restrictions on travel to Cuba were imposed by the Secretary of State. 26 Fed. Reg. 492. In September 1961, the United States prohibited assistance to any country which assisted Cuba unless the President determined that American assistance would be in the national interest. A complete embargo on trade with Cuba was imposed in February 1962 (Pres. Proc. No. 3447, 27 Fed. Reg. 1085), and a month later the United States prohibited imports of merchandise made or derived in whole or in part from products of Cuban origin (27 Fed. Reg. 2765).

In May 1962, the United States denied bunkering facilities in United States ports to all vessels under charter to the Sino-Soviet bloc which were engaged in trade with Cuba, and in the same month the United States prohibited returning tourists from bringing in products of Cuban origin. The Foreign Aid and Related Agencies Appropriation Act of 1963 prohibited aid to any country which furnished or permitted its ships to carry to Cuba arms, ammunition, implements of war, petroleum, transportation materials, or other materials of strategic value. 76 Stat. 1163, 1165. A similar prohibition was placed on aid to any country which furnished or permitted its ships to carry items of economic assistance to Cuba, unless the President

determined that withholding United States aid would be contrary to the national interest. 76 Stat. 1163, 1165. And in July 1963, the United States issued assets control regulations blocking all Cuban assets in this country. 28 Fed. Reg. 6974.

On October 3, 1962, Congress passed a joint resolution stating that the United States is determined (76 Stat. 697):

to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere; [and]

* * * * *

to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.

President Johnson reiterated United States policy towards Cuba in April 1964: "Our first task must be, as it has been, to isolate Cuba from the inter-American system, to frustrate its efforts to destroy free governments, and to expose the weakness of communism so that all can see. That policy is in effect and that policy is working. * * * [I]t has lessened opportunities for subversion * * *." Speech at Associated Press Luncheon in New York, April 20, 1964.

The United States has not been alone in taking action to isolate Cuba. This country has, from the beginning, acted in concert with the other American Republics in order to prevent the spread of commu-

nism. The January 1962 meeting of Ministers of Foreign Affairs of the American Republics took action which "excluded the present government of Cuba from participation in the inter-American system," resolved "to suspend immediately trade with Cuba in arms and implements of war of every kind," established a Special Consultative Committee on Security to advise governments on combatting Communist subversion, and urged member states "to take those steps that they may consider appropriate for their individual or collective self-defense, and to cooperate, as may be necessary and desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this Hemisphere of Sino-Soviet power * * *." Eighth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.8 (1962).

Early in October 1962, the Foreign Ministers agreed at an informal meeting in Washington that it was necessary for their countries to intensify measures to prevent activities of a subversive nature. 47 Dep't. State Bull. 598. The Foreign Ministers requested the Council of the Organization of American States to undertake an urgent study "of the transfer of funds to the other American Republics for subversive purposes, the flow of subversive propaganda and the utilization of Cuba as a base for training in subversive techniques." *Id.* at 600.

Pursuant to this request, a Special Committee of the Council prepared a series of studies, one of which considered the question of controlling travel to Cuba.

The study on travel, prepared early in 1963 and approved by the Council in July 1963, urged the American governments to take a series of measures (Report submitted by the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. G/IV (1963)):

RECOMMENDATIONS ON CONTROL OF TRAVEL

The effective control of travel to Cuba should include both national and international procedures.

a. *National Procedures*

1. To provide that every person who crosses an international border must have in his possession some travel or identification document, and to exercise control over such documentation.

2. To prohibit trips to Cuba, as a general rule, and to regulate those that may be made to those persons who have valid reasons, such as those of an official or humanitarian nature. It would be advisable, in the corresponding stipulations, to consider the following suggestions, among others:

a. To limit the use of passports or other travel documents by means of an inscription stating that these are not valid for travel to Cuba, and to penalize as a violation of law any trip not authorized by the terms of the travel document.

b. To require that every person who desires to travel to Cuba present a request to that effect to the appropriate office and prove that he has a valid reason for making the trip. If the permit is issued, a state-

ment to that effect should be made on the passport itself.

c. To give wide publicity to the laws and regulations of each country in relation to travel to Cuba, and to inform the travel agencies and transport companies of them for due compliance therewith.

3. To provide to the immigration officers at the ports, border crossings, and airports a list of persons known to be agents or members of the communist party, and of those who have traveled to Cuba, for such control action as they deem necessary. For this purpose close cooperation between the police and immigration authorities is required.

4. To record in the passport or other travel documents authorized by the government of the traveler the date of departure, date of entry, destination, and place of origin.

b. International Procedures

1. To recommend to the governments that, in cooperation with one another, they:

a. Observe the limitations on travel that are noted in the respective documents. For example, a country "A" should take the steps necessary in order not to permit the departure for Cuba of a national of a country "B" whose documentation specifies that it is not valid for making such a trip. In relation to this measure, country "A" should not accept visas, tourist cards, or other documents for travel to Cuba that are not an integral part of the passport or travel document of a national of country "B".

b. Supply the other governments with information regarding its laws and regulations on travel.

c. Inform the diplomatic or consular authorities of the respective American country when a national of that country is refused departure for Cuba.

d. Transmit to the diplomatic or consular authorities of any other American country the names of its nationals that appear in the passenger list of every airplane or ship that departs for Cuba or comes from that country.

e. Examine minutely the travel documents of every passenger in order to prevent violations of the terms of those documents.

2. To establish a system for the exchange of information between governments on known communists, subversive agents, and persons who travel to Cuba.

In March 1963, the President of the United States met with the Presidents of the five Central American Republics and Panama to confer on problems common to the countries of that area, including subversion from Cuba. The Declaration of Central America which resulted from their Conference at San Jose stated (48 Dept of State Bull 517 (1963)):

The Presidents agree that Ministers of Government of the seven countries should meet as soon as possible to develop and put into immediate effect common measures to restrict the movement of their nationals to and from Cuba,

and the flow of material, propaganda and funds from that country.

This meeting will take action, among other things, to secure stricter travel and passport controls, including appropriate limitations in passports and other travel documents on travel to Cuba. Cooperative arrangements among not only the countries meeting here but also among all OAS members will have to be sought to restrict more effectively not only those movements of people for subversive purposes but also to prevent insofar as possible the introduction of money, propaganda, materials, and arms. Arrangements for additional sea and air surveillance and interception within territorial waters will be worked out with cooperation from the United States.

The meeting of Ministers in Government took place on April 3d and 4th, 1963, at Managua, Nicaragua. Resolution I of the Managua meeting provided for travel restrictions closely similar to the study (see pp. 31-33, *supra*) previously prepared for, and later approved by, the Council of the Organization of American States (48 Dep't of State Bull. 719).

Finally, at their July 1964 meeting, the Ministers of Foreign Affairs of the American Republics resolved (Resolution I, Ninth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. F/IL.9 (1964)):

a. That the governments of the American states not maintain diplomatic or consular relations with the Government of Cuba;

b. That the governments of the American states suspend all their trade, whether direct or indirect, with Cuba, except in foodstuffs, medicines, and medical equipment that may be sent to Cuba for humanitarian reasons; and

c. That the governments of the American states suspend all sea transportation between their countries and Cuba, except for such transportation as may be necessary for reasons of humanitarian nature.

3. The restriction on travel to Cuba plays an important part in isolating Cuba.

As a result of the individual and collective measures taken by the United States and the other American governments, and as a result of the growing understanding of the threat which Cuba represents for the free world, Cuba has to a large degree become isolated. All but one of the American governments have broken diplomatic relations with Cuba. Trade between the free world and Cuba is less than one-fifth of what it was in 1959. There is at present no passenger vessel service between Cuba and the free world and there is only one airline in the free world providing scheduled air service to Cuba. It has become progressively more difficult for persons to travel to and from Cuba for indoctrination and training in subversion.

The restriction on travel to Cuba imposed by the United States and the other American republics have been an important part of this policy of isolation. It is an important component of economic isolation since

travel by foreigners in Cuba produces much needed foreign exchange and is extremely useful for trade. Even more vital, restriction on travel is the principal means for preventing persons from going to Cuba for training in subversion and then returning to Latin America to perform what they have been taught. While most such persons are doubtless Latin American nationals and not citizens of the United States, it is unlikely that travel restrictions could be maintained if they did not apply to United States citizens as well as nationals of the other American republics. The United States has taken the lead in formulating and executing the inter-American policy of isolating Cuba, and other countries of the Hemisphere have to a considerable degree followed this lead. If the United States refused to continue its own participation in this collective effort to limit travel, it would be extremely difficult, if not impossible, to convince Latin Americans to impose greater restrictions on their citizens.

Furthermore, the indiscriminate travel of American citizens to Cuba could easily lead to incidents which might embroil the United States in international conflict. The foreign traveler may be arrested, held hostage, or otherwise abused. Such events actually occurred before the present Cuban government came to power, and in its early days. See, *e.g.*, International Commission of Jurists, *Cuba and the Law* (1962).

An integral part of American foreign policy is the government's commitment to protect all citizens. This policy implements an 1868 statute which com-

mands the President to protect all citizens from wrongful imprisonment by a foreign government by using "such means, not amounting to acts of war, as he may think necessary and proper * * *." Rev. Stat. Secs. 2000-2001 (1878), 22 U.S.C. 1732. While perhaps exceptions could be made, this general policy has three important advantages: (1) it assures every citizen that this country will take steps to protect him; (2) it tends to deter other countries from lightly interfering with the rights of American citizens; and (3) it avoids the international embarrassment of having United States citizens mistreated without any response from their government. The restrictions on travel to Cuba imposed by the Secretary virtually eliminate this problem by preventing all Americans, except those few in categories excluded from the restriction, from going to Cuba and thereby avoiding opportunities for Cuban harassment of American citizens. As a result, the United States is not placed in the dilemma of either imposing measures against Cuba to end harassment or ignoring such treatment of American citizens completely.

In sum, travel controls have been and are today an integral part of American foreign policy towards Cuba. They are an integral and vital part of the program adopted by the United States in cooperation with its neighbors, for isolating and containing the Cuban regime. And they help to minimize the possibility of international conflict with that country.

It is in this light that the power to adopt the measures as well as their constitutional validity must be judged.

B. THE SECRETARY HAS BEEN AUTHORIZED TO RESTRICT TRAVEL TO PARTICULAR AREAS, SUCH AS CUBA, PURSUANT TO THE NEEDS OF THE FOREIGN POLICY OF THE UNITED STATES.

1. *The Executive Branch, by virtue of its inherent power over foreign relations and the Passport Act of 1926, has authority to refuse passports for particular areas and to limit the countries for which a passport is valid, as required by the necessities of international relations*

The broad scope of the President's authority to conduct foreign affairs has been recognized from earliest times to the present day. As the Senate Foreign Relations Committee stated almost 150 years ago, "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations. * * * For his conduct he is responsible to the Constitution." S. Doc. No. 231, 56th Cong., 2d Sess., 21 (1901) (reprinting an 1816 Report of the Senate Foreign Relations Committee). John Marshall stated in the House of Representatives in 1800 that the President is the "sole organ of the nation in its external relations." Annals, 6th Cong., col. 613. Similarly, this Court has held that the President's power over foreign affairs is "very delicate, plenary, and exclusive" and "does not require as a basis for its exercise an act of Congress * * *." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320. See also *United States v. Pink*, 315 U.S. 203, 229; *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111; Corwin, *The President: Office and Powers 1797-1957* (4th rev. ed., 1957) 225.

The plenary executive power over foreign relations—the recognition of foreign governments, break-

ing or establishing diplomatic relations, recognizing a state of war or neutrality among nations, negotiating executive agreements, adjusting and extinguishing international claims, etc.—often affects the contracts, property and personal movement of private citizens. Thus, recognition or non-recognition of a foreign government may affect title to property. *United States v. Belmont*, 301 U.S. 324, 330; *United States v. Pink*, 315 U.S. 203, 229; *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F. 2d 1000, 1003 (C.A. D.C.); *The Maret*, 145 F. 2d 431 (C.A. 3). In *United States v. Pink*, *supra*, the rights of creditors to assets of the Russian Government held by the New York Superintendent of Insurance were extinguished by the Litvinov Assignment—an agreement entered into by the President incident to recognition of the Soviet Union without the participation of Congress.⁵ The Court nonetheless said (*id.* at 228):

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment.

Similarly, although the settlement of foreign claims may reduce or extinguish the claims of U.S. citizens, it is indisputable that “the President’s control of foreign relations includes the settlement of claims.”

⁵ For the documents pertaining to recognition, see Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dep’t of State, Eastern European Series No. 1 (1933).

Mr. Justice Frankfurter concurring in *United States v. Pink*, 315 U.S. 203, 240. See also *Ozanic v. United States*, 188 F. 2d 228 (C.A. 2); *Z. & F. Assets Realization Corp. v. Hull*, 114 F. 2d 464 (C.A. D.C.), affirmed, 311 U.S. 470.

The issuance or refusal of passports according to the necessities of international relations is likewise an integral part of the Executive's responsibility for foreign relations. In international law and diplomacy the suspension of travel to a foreign country is a recognized instrument of foreign policy. Bishop, *International Law*, 559 (1953); Stowell, *International Law*, 469 (1931); cf. 2 Hyde, *International Law*, 169-172, 185-186 (1922); 2 Lauterpacht-Oppenheim, *International Law*, 134-144 (7th ed., 1952). A passport is, in a sense, an instrument addressed by one government to another vouching for the bearer and seeking his protection. Travelers holding passports expect and receive a degree of recognition not extended to others. The refusal to issue passports also minimizes the risk of international complications arising from incidents affecting the person or property of travelers, whether or not the refusal of passports is actually coupled with a prohibition upon travel itself. The suspension of the issuance of passports valid for travel to a particular country is also a way of exerting pressure upon that country, whether or not all travel is actually interdicted. And we have shown above how an actual restriction upon travel to a particular area may be not only "an instrument of foreign policy" but indeed a foreign policy "in

and of itself." (*Worthy v. Herter*, 270 F. 2d 905, 910 (C.A. D.C.), certiorari denied, 361 U.S. 918).⁶

While the powers confided to the Executive by Article II of the Constitution would seem amply broad enough, even in the absence of legislation, to cover the issuance, refusal and restriction of passports in the execution of foreign policy, we need not rely exclusively upon the Executive's inherent power over foreign affairs. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, grants the President and the Secretary of State authority over passports in the broadest terms. Section 1 provides—

The Secretary of State may grant and issue passports * * * under such rules as the Presi-

⁶There is no merit to the claim (Br. 41) that the President's inherent power over foreign affairs does not extend to matters affecting the right to travel because it is protected by the Fifth Amendment. If the Fifth Amendment secures an absolute right to travel, of course it may not be curtailed under either inherent executive power or express legislation. We deal with that claim below (pp. 66-74 *infra*). But if freedom to travel abroad is subject to reasonable restrictions imposed by pressing national interests, as we contend, then the fact that the restriction must be consistent with "due process of law" does not automatically exclude reliance upon inherent constitutional power over international relations. For example, the title to property, claims against foreign nationals, and the rights of creditors to the assets of a foreign government located in the United States are interests protected by the Fifth Amendment against arbitrary destruction yet such rights can constitutionally be altered or extinguished by an exercise of the Executive's inherent powers in foreign affairs. *United States v. Belmont*, 301 U.S. 324, 330; *United States v. Pink*, 315 U.S. 203, 229; *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F. 2d 1000, 1003 (C.A. D.C.); *The Maret*, 145 F. 2d 431 (C.A. 3). See also pp. 39-40 *supra*.

dent shall designate and prescribe for and on behalf of the United States * * *.

The provision is derived from Section 23 of the Act of August 18, 1856, 11 Stat. 52, which has been repeatedly reenacted without significant change.

On its face the power thus conferred is unequivocally discretionary; and, if the Secretary has any discretion, it must include the power to determine the countries for which passports will be issued. Such is the uniform interpretation of the lower courts. *Worthy v. Herter*, 270 F. 2d 905, 912 (C.A. D.C.), certiorari denied, 361 U.S. 918; *Frank v. Herter*, 269 F. 2d 245 (C.A. D.C.), certiorari denied, 361 U.S. 918; *Porter v. Herter*, 278 F. 2d 280 (C.A. D.C.), certiorari denied, 361 U.S. 918; *MacEwan v. Rusk*, 228 F. Supp. 306, 313-314 (E.D. Pa.), pending on appeal to the Third Circuit. The broad reading is strongly confirmed by the stipulation that the Secretary is to exercise the delegated power "under such rules as the President shall designate and prescribe"; for it is unlikely that Congress would have referred to the ultimate responsibility of the President unless it realized that broad authority was being conferred over a matter important in the conduct of policy.

It would seem to us, therefore, that the statutes authorizing the Secretary of State to issue passports, first enacted in 1856 and carried forward into the Passport Act of 1926, should be read as confirming and regularizing the broad authority which the Executive would otherwise have over passports as an incident of the conduct of foreign relations, so that the Act of 1926 is, in a substantial sense, an independent

source of the authority to limit the areas for which passports shall be issued. A niggardly construction should not be put upon a grant of authority to the Executive in legislation dealing with foreign affairs. *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304; *United States v. Rosenberg*, 150 F. 2d 788 (C.A. 2), certiorari denied, 326 U.S. 752; *Star-Kist Foods, Inc. v. United States*, 275 F. 2d 472 (C.C.P.A.).

But it is unnecessary to pitch the case upon either source of authority alone, even though either alone would be sufficient. The law is not so artificial as to require the Secretary to find his authority exclusively in the statute or exclusively in the inherent constitutional authority of the Executive; nor does it require him to assign precise portions to each. The law, especially in this area, is a living organism. For more than a century the power conferred by statute and the authority derived from Article II have grown together in a symbiotic relation, confirmed and strengthened by executive practice, congressional acquiescence and reenactment of the statutory law. We summarize this history immediately below. The net effect is that the Secretary, acting under the orders of the President, now has full authority to restrict the issuance of passports generally, to limit the countries for which passports will be issued, and to limit the areas in which issued passports will be valid, according to international conditions and the needs of the foreign policy of the United States.

The Act of February 4, 1815, Sec. 10, 3 Stat. 195, prohibited citizens from traveling without a passport to territories or provinces belonging to the enemy, apparently assuming that the Executive had inherent power to issue or refuse passports. During the Civil War Secretary Seward issued an order prohibiting travel to Europe by citizens "on errands hostile and injurious to the peace of the country and dangerous to the Union." 3 Moore, *Digest of International Law*, 920 (1906).

Area restrictions were imposed for the first time in this century in January 1915. As a result of the famine in Belgium, the Department of State stopped issuing passports for use in that country except to "applicants obliged to go thither by special exigency or authorized by Red Cross or Belgian Relief Mission." 3 Hackworth, *Digest of International Law* 526 (1942). On January 24, 1917, because of the tensions resulting from the war in Europe, the President promulgated new "Rules Governing the Granting and Issuing of Passports in the United States." Exec. Order No. 2519-A, reprinted in *For. Rel.*, 1917, Supp. 1, p. 573. Section 3 authorized the Secretary to refuse passports in his discretion. Section 5(b) required passport applicants going abroad on "commercial business" to submit a letter supporting the application and giving the particulars of the proposed trip. It also provided (*ibid.*):

The applicant who is going abroad for any purpose other than commercial business must satisfy the Department of State that it is *imperative* that he go, and he should submit satisfactory documentary evidence substantiat-

ing his statement concerning the imperativeness of his proposed trip.

It is noteworthy that these regulations cited as a source of authority the general passport legislation then current corresponding to the Passport Act of 1926. Act of June 14, 1902, 32 Stat. 386. The restrictions were imposed before the United States declared war and continued after the hostilities were terminated. No passports were issued for travel in Germany and Austria until July 18, 1922, and none for Russia until September 1923. *Department of State Passport Policies*, Hearings before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., 64.

In 1919, the Department of State refused to issue passports for "unnecessary" travel from the United States to Europe. The restricted areas were not limited to enemy territory. The Department explained (3 Hackworth, *supra*, p. 530):

The passport restrictions are maintained first because the Department deems it inadvisable in general to allow unnecessary travel between this country and Europe before peace has been declared, and second, because of conditions in Europe, particularly in the shortage of food and overtaxing of transportation and other services.

Area restrictions were imposed on several occasions during the 1930's. Passports were not issued for travel to Ethiopia, except to journalists and "well-known" writers, from November 1935 to July 1936. 3 Hackworth, *supra*, p. 531. Passports were stamped "not valid for travel in Spain," again with an exception for newspapermen, following the outbreak of the

Spanish Civil War in December 1936. *Id.* at 533. The measure was viewed as a part of the government's policy of non-intervention in the Spanish Civil War and was rigorously enforced. In addition to stamping passports, the Department required affidavits stating that it was not the traveler's intention to go to Spain. A similar, but more stringent, restriction was placed on travel to China in August 1937, in view of "the disturbed situation in the Far East." Passports were validated for travel to China only "in exceptional circumstances," and in no cases for women or children. *Id.* at 532.

On March 31, 1938, the President, acting under the Passport Act of 1926, specifically authorized the Secretary to impose area restrictions in the issuance of passports. Executive Order No. 7856, issued on March 31, 1938, provides (22 C.F.R. 51.75):

Refusal to issue passport. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

The executive order is still in force.

In September 1939, following the issuance of the executive order, conditions in Europe led to a general tightening of passport controls. Travel to Europe was prohibited except with a passport specially validated for such travel. Passports were validated only upon a showing that the proposed

travel was imperative. Departmental Order No. 811, 4 Fed. Reg. 3892.

Area restrictions have been imposed on numerous occasions since World War II. Travel to Yugoslavia was restricted between 1947 and 1950 as a result of a series of incidents involving American citizens (Dep't of State Press Conference, May 9, 1947). Travel to Hungary was restricted between December 1949 and May 1951 in order to secure the release of Robert Vogeler, an American citizen imprisoned by the Hungarian Government (22 Dep't of State Bull. 399), between December 1951 and October 1955 in connection with the imprisonment of four American fliers (26 *id.* at 7), and after February 1956, as a result of the Hungarian revolt (34 *id.* at 246). Similar measures were taken against Czechoslovakia in June 1951, to effect the release of the American journalist, William Oatis.⁷ 24 *Id.* at 932. In May 1952 passports were stamped not valid for travel to Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union. 33 Dep't of State Bull. 777.⁸ On October 21, 1955, the Secretary

⁷ Section 1732 of 22 U.S.C. directs the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government."

⁸ Appellant claims (Br. 42-43) that Press Release 341 shows that the State Department does not have authority to make area restrictions. The press release stated that the procedure for restricting passports did not forbid American travel to the named areas and went on to say: "It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if

of State announced that passports would not require special validation for travel to Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union but would be stamped invalid for travel "to the following areas under the control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions of China, Korea, and Viet-Nam under communist control." 33 Dep't of State Bull. 777. In 1956 passports were for a brief period stamped invalid for travel to or in Egypt, Israel, Jordan, and Syria. 35 Dep't of State Bull. 756.*

In sum, for more than a century the Secretary of State, acting under the President, has restricted the issuance of passports, refused passports for travel in particular areas, and specified particular areas in which issued passports would be invalid, whenever in their judgment world conditions or implementation of the foreign policy of the United States so required. Congress has never questioned the executive interpretation of the authority over passports, including the area restrictions; nor has it been challenged, except lately, in the courts. On a number of occasions—

no objection is perceived, the travel may be authorized." Read as a whole, the press release simply indicated that exceptions to the general prohibition on travel could be authorized by the State Department.

* For further discussion of the Secretary's use of area restrictions, see e.g., 3 Hackworth, *Digest of International Law*, 524-536 (1942); 3 Moore, *Digest of International Law*, 1015-1021 (1906); *The Right to Travel*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 190-194 (1957).

the latest in 1926—Congress reenacted the same broad passport legislation against the background of executive practice. In 1941 and 1952, as we shall show, Congress must have surveyed the established practice in issuing or refusing passports when it made travel without a valid passport, under certain conditions, a criminal offense, yet with that interpretation before it, Congress did nothing to curtail the authority asserted by the Executive Branch.

Under these circumstances the long history of executive practice has threefold importance. *First*, to the extent that the practice was expressly or impliedly based upon the passport legislation, it is entitled to great weight as the consistent interpretation of a statute by the officials charged with its administration. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294; *Louisville & N. R. Co. v. United States*, 282 U.S. 740; *Costanzo v. Tillinghast*, 287 U.S. 341.

Second, the use of the general discretionary language in the Passport Act of 1926, after the power to impose area restrictions upon passports had been asserted under prior legislation (sometimes with and sometimes without reference to the statutory authority), demonstrates approval of the administrative interpretation. *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-545; *Service v. Dulles*, 354 U.S. 363, 380; *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366; see also the cases cited in Davis, *Administrative Law Treatise*, 331-338.

Third, insofar as the area restrictions imposed in the issue of passports should be understood to have been based upon the inherent power of the Executive over foreign relations, the long-settled practice is entitled to great weight in the interpretation of the constitutional authority. *The Pocket Veto Case*, 279 U.S. 655, 688-689.

The nub of the matter was succinctly stated in *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473, where the Court upheld the inherent authority of the Executive to close public lands that Congress had previously opened to private acquisition, relying upon a long-established executive practice which had never been challenged by Congress:

But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the assumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule, that in determining the meaning of a statute or the existence of a power, weight should be given the usage itself—even when the validity of the practice is the subject of investigation.

See also *Inland Waterways Corp. v. Young*, 309 U.S. 517, 525; *Ray v. Blair*, 343 U.S. 214, 229; *Van Dyke*

v. *Geary*, 244 U.S. 39, 46 (discussing the Arizona Constitution); *United States v. Allocco*, 305 F. 2d 704, 714 (C.A. 2), certiorari denied, 371 U.S. 964.¹⁰

Appellant argues (Br. 26) that whatever authority was exercised under the passport acts or pursuant to the inherent executive power did not include the prohibition of all travel to a proscribed area; perhaps a citizen could not obtain a passport for a restricted area, appellant says, but there was no legal barrier to the travel itself. The objection is irrelevant. We are not arguing that the Passport Act of 1926, standing alone, confers authority to prohibit actual travel in the sense that the journey would be a crime or offense against the United States or could be prohibited by the government. And although we believe that it exists, there is no need for us to rely in this case (or in any other case under the 1952 legislation) upon an inherent executive power to impose a legal prohibition upon travel to a particular country with-

¹⁰ Appellant claims (Br. 29) that lack of executive power under Section 211a is shown by Congress' failure to pass any of the bills providing for area restrictions which have been introduced in recent years. The opposite inference, that Congress considered such legislation superfluous, is, in view of the practice of imposing such restrictions, far more plausible. The bills submitted by the executive branch were omnibus passport bills intended to deal with a wide range of problems, including that of denying passports to Communists. Consequently, the failure of Congress to act on these bills says little about Congressional attitudes towards the particular problem of area restrictions.

out the aid of legislation. The practical effect of the suspension of the issuance of passports for specified areas must always have been to suspend normal travel to those areas, but whether that was the consequence or not is immaterial. We are concerned at this stage of the argument only with showing that at the time Congress enacted Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, the Secretary, whatever the legal consequences of his action, had consistently exercised the authority to deny passports for travel to a particular area as required by the state of international relations.¹¹ We

¹¹ In fact, travel without a passport was a crime during a good part of the period in question. While the Act of May 22, 1918, 40 Stat. 559, was in force, during and after both World War I and World War II, travel without a passport was a criminal offense, and during those periods passports were not issued for restricted areas under the authority of regulations issued by the President under the general passport legislation.

Appellant erroneously asserts (Br. 26) that area restrictions prior to 1926 were imposed only during wartime. Travel to Belgium was prohibited in 1915, before the United States entered World War I. The restrictions on travel to Germany and Austria imposed under the President's 1917 Rules were not lifted until July 18, 1922, long after the war ended, and those on travel to Russia not until September 1923. *Department of State Passport Policies, Hearings, supra*, p. 64.

Appellant is also in error in claiming (Br. 27), with respect to the Passport Act that "in the various restrictions imposed by the Secretary after 1926, there was again no claim that travel was prohibited * * *." Departmental Order No. 811; 4 Fed. Reg. 3892, issued when area restrictions were imposed in 1939, cited 22 U.S.C. 211a as authority. The Department in this Order called attention to 22 U.S.C. (1940 ed.) 221 (now 18 U.S.C. 1544), which made it a criminal offense willfully "to use any passport in violation of the conditions or restric-

consider below (pp. 56-62, *infra*) whether congress modified or confirmed that broad control over the issuance and denial of passports, when it attached a statutory prohibition against travel to the denial or restriction of a passport by the enactment of Section 215.

Kent v. Dulles, 357 U.S. 116, is not contrary to our position. The sentence on page 129 asserting that if liberty of travel is to be regulated it must be pursuant to the lawmaking functions of Congress, like the holding that the power to deny Kent his passport was not conferred by the Act of 1926, must be read in the context of the issues presented by the case. The central question was whether a citizen could be denied a passport and barred from leaving the country because of his beliefs or associations. As the Court said, "We deal with beliefs, with associations, with ideological matters." *Id.* at 130. Appellant in this case has not been singled out or deprived of rights which other citizens are granted. Beliefs and associations play no role under the orders at stake. Travel to Cuba has been restricted for reasons related solely to the foreign policy interests of the United States, and not, as in *Kent*, "solely because of [the applicant's] refusal to be subjected to inquiry into their beliefs and associations." *Ibid.*

Similarly, the long passage from *Kent* quoted on page 25 of appellant's brief, in which the Court "tensions therein contained." Moreover, any failure to claim that the restrictions upon travel were a barrier to actual travel during the 1930's is irrelevant. It was not until the Act of June 21, 1941, 55 Stat. 252, that the denial of passports resulted in a legal disability from travelling abroad (see pp. 58-59 *infra*).

summarized the prior practice in the refusal of passports *so far as material in that case*, must be read with reference to the kind of refusal there challenged—a refusal based upon the character of the particular applicant, not upon considerations of foreign policy affecting all persons seeking passports valid for a particular area. That the passage purports to do no more is evident (1) from Mr. Justice Douglas' careful statement that he was summarizing the cases of prior refusal "So far as material here"; (2) from the instances listed; and (3) from the omission of any reference to the widely-known area restrictions imposed upon all travellers according to the demands of foreign policy.

Moreover, *Kent* concerned "the right of exit," an historic right asserted at least as early as 1215 in Articles 41 and 42 of the Magna Carta to prevent the King from confining his subjects within the realm. See 41 Geo. L.J. 63, 66-67. (1952). The "right of exit," both historically and in its practical impact, is significantly different from the right to travel to a particular area. Historically, the right to leave one's country has been thought of as a right to emigrate in order to escape persecution or confinement, and not as an unrestricted right to travel to any particular place in the world at any time. See Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, U.N. Doc. No. E/CN.4/Sub. 2/220/Rev. 1, pp. 1-9 (1963). The "right of exit" is not at issue in this case since appellant has not

been denied the right to leave the country. He may travel to almost any country in the world.¹²

In summary, we think it plain that by virtue of the Passport Act of 1926 and the inherent executive power over international relations the Secretary of State, acting under the President, had ample power, prior to the Immigration and Nationality Act of 1952, to take account of international conditions and implement the foreign policy of the United States by withholding passports intended for travel to particular areas and limiting the validity of the passports he issued. The legal consequences of an exercise of that power in the absence of other legislation may be open to dispute, but the existence of the power over passports is beyond debate. We show next that when Congress, in the Act of 1952, forbade travel without a valid passport under specified conditions, and thus by statute made the withholding or restriction of a passport in substance a limitation upon travel, Congress ratified and confirmed the power of the Secretary and the President to impose appropriate area limitations.

¹² Appellant cites (Br. 55) the Universal Declaration of Human Rights as setting forth "the principles of liberty of movement which underlie this case." The Declaration of Human Rights states (U.N. Dep't of Public Information, Universal Declaration of Human Rights, Article 13, S. Doc. 123, 81st Cong., 1st Sess. 1156):

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and return to his country.

To the extent that the Declaration is relevant, appellant enjoys the rights it asserts. He has the right to leave and return to his country.

2. *Section 215 of the Immigration and Nationality Act confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof.*

Section 215(b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185(b), provides—

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The required proclamation having been issued,¹³ it is Section 215(b) that makes the withholding or restriction of the validity of a passport a legal prohibition upon travel to an interdicted area.

When Congress enacted Section 215(b), it must have been aware of the Secretary's assertion and repeated exercise of authority, under the President, to limit the issuance of passports for travel to troubled areas, as required by world conditions and the foreign policy of the United States. The prior refusals to issue passports for Belgium, Ethiopia, Spain, China, Europe, Hungary and Czechoslovakia during such periods were widely publicized. In 1952

¹³ See pp. 62-66 *infra*.

there was outstanding an Executive Order expressly authorizing the Secretary of State in his discretion (22 C.F.R. 51.75)—

to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries. * * * and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

While Section 215(b) was being debated in Congress, area restrictions were being applied by the Secretary in the case of Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Romania and the Soviet Union. See p. 47 *supra*.

Manifestly, the new provision was not intended to curtail the existing discretion of the Executive to limit the areas for which passports would be valid, and to refuse passports intended for travel to the excluded areas, when such travel by U.S. citizens would be inconsistent with pressing international considerations. The Act of 1952 did nothing to limit the discretionary authority over passports that the Executive had long and widely asserted. Since Congress was legislating in the area of passports, even silent acquiescence would have been enough to evidence a legislative intent to have the practice continue. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473, and the cases cited at pp. 50-51 *supra*. The present case is even stronger. Congress did not merely acquiesce. Section 215(b) of the 1952 Act took the existing authority over passports as its predicate in prohibiting travel without a valid

passport. Without it the provision would be inoperable because no new authority over the issuance of passports was expressly granted. It would be wholly artificial to suppose that Congress predicated the existence of any different power than had been consistently asserted by the President and Secretary. Section 215(b), therefore, had a twofold effect: (a) it implicitly ratified the existing discretionary power to impose area restrictions in the issuance of passports as an incident of foreign policy; and (b) it attached to the refusal or restriction of a passport the statutory consequence of a legal prohibition against the travel. The net result of Section 215(b) of the 1952 Act, operating in conjunction with the broad and established authority over passports under the 1926 Act and/or the inherent powers of the Executive, is therefore to confirm to the President and the Secretary the power to suspend all travel to specified areas in times of proclaimed emergency as the necessities of international relations may require.

There was nothing novel in this course of proceeding. In 1917, as we have shown, the President, citing the authority of a precursor of the Act of 1926, issued general regulations giving the Secretary broad authority over the issuance of passports, and the Secretary imposed various restrictions including restrictions as to area. See pp. 44-45 *supra*. Thereafter, in words virtually identical to the corresponding provision of the Act of 1952, Congress enacted legislation, applicable while the United States was at war, which prohibited a citizen from entering or leav-

ing the United States "unless he bears a valid passport." Act of May 22, 1918, 40 Stat. 559. Obviously the 1918 statute picked up and confirmed the discretionary authority that the Executive was actually exercising and then attached to the refusal or restriction of a passport a legal interdiction of the travel. That was the interpretation placed upon the statute during its operation. See p. 45 *supra*.

Congress followed essentially the same course in the Act of June 21, 1941, 55 Stat. 252. During the preceding decade the Secretary of State had frequently imposed area restrictions upon passports and, as we have seen, the President issued an executive order in 1938 explicitly authorizing the practice. See pp. 45-46 *supra*. The Act of June 21, 1941, thereafter revived the statutory interdiction of travel without a valid passport by amending the 1918 statute so as to make it effective not only when the United States is at war but also "during the existence of the national emergency proclaimed by the President on May 27, 1941." 55 Stat. 252. Area restrictions were imposed while this statute was in force until 1952 when the impending cessation of the legal state of war invited renewed congressional attention.

Against this background the significance of Section 215(b) of the Act of 1952 becomes clear. The material portions are taken almost verbatim from the 1918 statute revived in 1941. The obvious intent was to have Section 215(b) operate in like fashion. Under such circumstances reenactment without change incorporates the prior interpretation by those charged with

administering the legislation. *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339, and the cases cited at p. 49 *supra*.

This is also the manner in which Section 215(b) of the 1952 Act was interpreted shortly after its enactment by the executive officials charged with its administration. Presidential Proclamation No. 3004, 67 Stat. C31, which was issued in 1953 pursuant to Section 215(b), specifically stated that the departure of citizens would be governed by 22 C.F.R. 53.1 to 53.9. Section 53.8 of 22 C.F.R. provided in pertinent part (22 C.F.R. (1949 ed.) 53.8):

§ 53.8 *Discretionary exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

This administrative interpretation of the statute is entitled to considerable weight (see the cases cited at p. 49 *supra*).

Section 215(b) does not confront the Executive with the bare alternative of interdicting any departure from the United States or allowing travel to any country. The practice under its predecessors belies that interpretation, as does the consistent use of area restrictions upon passports unaccompanied by statutory interdiction of unapproved travel. As the district court said in *MacEwan v. Rusk*, 228 F. Supp.

306, 310 (E.D. Pa.), pending on appeal to the Third Circuit:

If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power.

Finally, it is persuasive that every court which has considered the question has upheld the area restrictions upon travel resulting from the Secretary's refusal or restrictions of passports in conjunction with Section 215(b). In *United States v. Healy*, 376 U.S. 75, 82-83, note 7, the Court noted in passing that the Secretary's denial of a passport valid for Cuba would make a trip to the island unlawful.¹⁴ The Court of Appeals for the District of Columbia Circuit has three times upheld the area restrictions (*Worthy v. Herter*, 270 F. 2d 905, certiorari denied, 361 U.S. 918; *Frank v. Herter*, 269 F. 2d 245, certiorari denied, 361 U.S. 918;

¹⁴ Appellees had been indicted for forcing the pilot of a private plane to fly them from Florida to Cuba. The Court said (*id.* at 83, note 7):

However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961.

Porter v. Herter, 278 F. 2d 280, certiorari denied, 361 U.S. 918)), as did both the court below (R. 32-67) and the three-judge district court in *MacEwan v. Rusk*, *supra*.¹⁵

3. *The authority to withhold passports valid for Cuba and thus to prohibit travel to the island has been properly exercised*

a. The power of the Executive Branch to restrict the issuance of passports to particular countries under its inherent power or the Passport Act of 1926 exists regardless whether there is a national emergency. However, Section 215 of the Immigration and Naturalization Act of 1952 (8 U.S.C. 1185) imposes the requirement of a passport only when the President has proclaimed a national emergency and has found that restrictions upon departure from this country are required. Otherwise, there is no statutory impediment to travel without a passport.

President Truman proclaimed a national emergency in 1950. Pres. Proc. No. 2914, 64 Stat. A454. In 1953, President Truman again found that a national

¹⁵ Judge Bazelon, whose dissent in *Briehl v. Dulles*, 248 F. 2d 561, 581 (C.A. D.C.), reversed *sub. nom. Kent v. Dulles*, 357 U.S. 116, foreshadowed the decision of this Court, nevertheless recognized the broad authority to impose area restrictions under Proclamation No. 3004, which brought into play the provisions of Section 215(b) of the 1952 legislation:

This authorization, like the authorization of Executive Order 7856 to issue "additional" passport regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

emergency existed and, pursuant to Section 215, imposed the restriction that Americans could not depart without a passport except to countries in the Western Hemisphere. Pres. Proc. No. 3004, 67 Stat. C31. The existence of a national emergency has subsequently been reaffirmed by President Eisenhower in 1960 (Exec. Order No. 10896, 3 C.F.R. (1959-1963 Supp.) 425) and President Kennedy in 1962 (Exec. Order No. 11037, 3 C.F.R. (1959-1963 Supp.) 621).

Appellant contends (Br. 51-54) that this Court is not bound by the President's proclamation of a national emergency, and that no such emergency exists. However, the proclamation of a national emergency involving an external threat to the security of the United States and friendly nations is within the discretion of the Executive. *Worthy v. Herter*, *supra*, 270 F. 2d at 910, 913; *Shactman v. Dulles*, 225 F. 2d 938, 941-942; see *Ludecke v. Watkins*, 335 U.S. 160, 170. The cases relied upon by appellants are easily distinguishable. They involve, not the foreign policy or national security of the United States, but such economic matters as housing, bankruptcy, and banking. In any event, even if the courts can properly inquire into the President's decision to declare a national emergency, this would not help appellant here. It is obvious that the emergency still continues. *MacEwan v. Rusk*, *supra*, 228 F. Supp. at 313. This nation was not far from war in West Berlin in the summer of 1961 nor in Cuba in October 1962, and there are numerous recent examples of Communist aggression in Hungary, Laos, Viet-Nam, Africa, and elsewhere which hardly require description here.

b. The Secretary of State, rather than the President, imposed area restrictions on travel to Cuba. Congress has provided that "[t]he Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to * * * such * * * matters respecting foreign affairs as the President of the United States shall assign to the department * * *." 5 U.S.C. 156. The President has specifically authorized the Secretary, under the authority of the Passport Act, in his discretion "to restrict the passport for use only in certain countries." Exec. Order No. 7856, 3 Fed. Reg. 799, 805, 22 C.F.R. 51.76. Presidential Proclamation No. 3004, 67 Stat. C31, issued pursuant to 8 U.S.C. 1185, makes the travel of citizens to and from the United States "subject to the regulations prescribed by the Secretary of State," incorporates into the Proclamation a regulation of the Department of State (22 C.F.R. 53.8) which refers specifically to the Secretary's authority to make area restrictions, and authorizes the Secretary to "revoke, modify, or amend such regulations according to the national interest."¹⁶ While these delegations cited statutory authorization, they equally serve to delegate the President's inherent authority. Pursuant to these grants of authority, the Secretary issued 22 C.F.R. 53.3b, which removed Cuba from the

¹⁶ Judge Bazelon in dissenting in *Briehl v. Dulles*, 248 F. 2d 561, 581 (C.A. D.C.), reversed *sub nom. Kent v. Dulles*, 357 U.S. 116, said that Presidential Proclamation No. 3004 "grants the Secretary discretion * * * to determine which parts of the world can be visited by Americans * * *."

area exempt for the requirement of a passport and Public Notice 179 (26 Fed. Reg. 492) which made passports invalid for travel to Cuba unless specifically endorsed for such travel. Thus, the President plainly has delegated to the Secretary his power to make the area restriction involved in this case, and the Secretary has exercised that authority in promulgating the restriction.

Appellant states (Br. 44) that "[t]he claim of delegation is rendered even weaker in the instant case, since it was not the Secretary, but a Deputy Under Secretary of State, who imposed the ban on travel to Cuba." While appellant seems now to be suggesting that this does not constitute issuance by the Secretary, his amended complaint expressly and, we believe, correctly stated that Public Notice 179 (26 Fed. Reg. 492)—which made American passports invalid for travel to Cuba unless specifically endorsed for such travel—was issued by the "Secretary of State, through his Deputy Under-Secretary for Administration * * *" (R. 2). Thus, far from being raised in the trial court, this issue was conceded. Appellant cannot raise it for the first time here. This is particularly true since appellant's failure to raise this issue in the district court has precluded the United States from introducing evidence that the Notice was issued by the Secretary. See *United States v. Di Re*, 332 U.S. 581, 588; *Giordenello v. United States*, 357 U.S. 480, 487-488.

In any event, the Deputy Under Secretary specifically signed Public Notice 179 "[f]or the Secretary of

State." It seems clear that the Deputy Under Secretary signed Public Notice 179 for the Secretary since the Notice refers to "the authority vested in *me* by Sections 124 and 126 of Executive Order 7856 * * *" (emphasis added). That authority is vested in the Secretary. 3 Fed. Reg. 799, 22 C.F.R. 51.75-51.77. Furthermore, the records of the Department of State show that the decision to restrict travel was made by the Secretary of State on January 14, 1961.

III

THE RESTRICTION LIMITING TRAVEL TO CUBA DOES NOT INFRINGE ANY OF APPELLANT'S CONSTITUTIONAL RIGHTS

A. THE RESTRAINT ON TRAVEL TO CUBA DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO TRAVEL

1. *The right to travel is subject to reasonable regulation*

In *Kent v. Dulles*, 357 U.S. 116, 125, this Court held that the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." But this statement is only the beginning, and not the end, of the inquiry necessary to determine whether this particular limitation on the right to travel—the prohibition against going to a single country—violates any constitutionally-protected right of appellant. For the "liberty" which the due process clause guarantees is not absolute but is subject to such regulation as is reasonably necessary to accommodate the proper ends of government. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500. Moreover, as Mr. Justice Holmes observed

in *Moyer v. Peabody*, 212 U.S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (Mr. Justice Frankfurter concurring).

Our society abounds with numerous restrictions upon the rights which the due process clause protects. The right of property is limited by innumerable forms of taxation and regulation. Similarly, the right to liberty may be limited in ways far more strict and confining than restrictions on travel to a particular country. For example, compulsory military service takes a man from his residence and occupation for service in the armed forces. See *Selective Draft Law Cases*, 245 U.S. 366; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, note 19. Similarly, children may be required to go to school, the insane may be confined to institutions, and the sick may be quarantined, for these are recognized as reasonable limitations on personal liberty.

In short, the due process clause protects life, liberty, and property only against arbitrary government action, and does not bar reasonable regulation. The right to travel, being one aspect of the right to liberty (*Kent v. Dulles, supra*, 357 U.S. at 125), is therefore subject to reasonable regulation.

The lower federal courts have uniformly agreed that the right to travel may validly be restricted as long as the restrictions are reasonable. In *Worthy v.*

Herter, 270 F. 2d 905, 909, certiorari denied, 361 U.S. 918, the Court of Appeals for the District of Columbia Circuit stated that "the right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons." Similarly, in *Shachtman v. Dulles*, 225 F. 2d 938, 941 (C.A. D.C.), the court held that the right to travel is "subject to the rights of others and to reasonable regulation under law." Accord, *Worthy v. United States*, 328 F. 2d 386, 393 (C.A. 5); *MacEwan v. Rusk*, *supra*, 228 F. Supp. at 308; *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D. D.C.). Indeed, in the *Kent* case itself, this Court recognized that reasonable restrictions of the right to travel were constitutionally permissible, since it said that a passport might be denied if "the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.

2. The restriction on travel to Cuba is reasonably and integrally related to the conduct of United States foreign policy

For six years, United States relations with Cuba have been troubled and difficult. The story of these years is the story of tensions, provocations, incidents, and crises. United States citizens have been arrested without charges, harassed, kidnapped and even killed. American property and business interests totalling more than one billion dollars have been expropriated. And external Communist power has gained its first and only beachhead in the Western Hemisphere, a beachhead which has been of great concern to the

other Republics in this Hemisphere and which led, in October 1962, to the Cuban missile crisis.

As we have seen in Part II of this brief (pp. 21-37), United States policy during these years has been directed at isolating Cuba and preventing it from either becoming again a direct military threat to the Western Hemisphere or subverting the other American Republics. The full range of American resources—military, political, and economic—has been deployed to carry out this policy. This has been done in cooperation with the other American governments through the machinery of the inter-American system. The policy has involved the severance of diplomatic and consular relations, increasing trade restrictions, and even the use of military force.

A major goal of the Castro regime in Cuba is to export its Communist revolution to the rest of Latin America. Under Secretary of State George Ball recently described this threat to the national security of the United States as “the menace of subversion—the undermining of existing governments, the arming of organized Communist minorities, and the mounting of campaigns of sabotage and terror.” Ball, *U.S. Policy Toward Cuba*, Dep’t of State Pub. No. 7690, p. 3 (1964). Earlier in 1961, an official Government “White Paper” on Cuba similarly stated (*Cuba*, Dep’t of State Pub. No. 7171, p. 2):

It is the considered judgment of the Government of the United States of America that the Castro regime in Cuba offers a clear and present danger to the authentic and autonomous revolution of the Americas—to the whole hope of spreading political liberty, economic develop-

ment, and social progress through all the republics of the hemisphere.

Travel between Cuba and the other countries of the Western Hemisphere is an important element in the spreading of subversion to those countries by the Castro government. The United States and the other members of the Organization of American States have coordinated their policies and undertaken collective measures designed to restrict travel with Cuba. If the United States were to withdraw from this collective endeavor, it is doubtful whether the present inter-American restrictions on Cuban travel could be maintained. If those restrictions were weakened or abandoned, it would greatly increase the opportunities of the Cuban Government for infiltration and subversion.

Moreover, permitting unrestricted travel by American citizens to Cuba could easily lead to incidents of the most serious kind. In the early period of the Castro regime United States citizens were harassed in numerous ways, arrested without charges, and even put to death. At the present time there is no way of limiting the risk of such incidents or of dealing with them through normal diplomatic channels. Even though United States citizens had been warned by the State Department that they entered Cuba at their own risk, a disastrous international chain of events might all too quickly result from recurrence of such incidents involving our citizens.

In short, the general restriction upon the right to travel to Cuba is supported by the weightiest of for-

eign policy considerations. In the light of (1) the tremendous importance which the United States ascribes to isolating Cuba, in order to prevent it from exporting subversion to other countries in this hemisphere, (2) the serious danger that permitting unrestricted travel by United States citizens to Cuba would lead to a weakening of the coordinated effort of this hemisphere to isolate that country, and (3) the possibility that incidents involving our citizens in Cuba would have most serious international repercussions, we submit that prohibiting travel to Cuba by American citizens is a reasonable regulation of the right to travel that does not violate the due process clause.¹⁷

The fact, to which appellant points (Br. 48), that certain narrow exceptions have been permitted to the restriction, provides no ground for invalidating the general ban. The exceptions are extremely limited: travel is permitted only for such groups as newsmen, clergymen representing denominations in Cuba, businessmen with previously established businesses in

¹⁷ As the court of appeals stated in *Worthy v. Herter, supra*, 270 F. 2d at 911:

We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction the travel of American citizens in that area. To hold the contrary would be to hold that the protection of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic.

Cuba, and persons whose relatives in Cuba face severe illness or death. But the danger that permitting our citizens to travel to Cuba would lead to a serious weakening or breakdown of the joint inter-American effort to isolate Cuba obviously is far less where only narrow categories and small numbers are involved than it would be if there were unrestricted travel. Furthermore, there is much less likelihood of incidents involving United States citizens in Cuba when only a small number is permitted to go there, and for important reasons. Even though such minimal travel entails some risk of incidents, it is outweighed by the national interest in permitting such travel.

Nor is there any merit to appellant's contention (Br. 50-51) that the restriction on travel to Cuba interferes "with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." No case has even suggested that the First Amendment gives any such right; the cases hold unanimously that liberty to travel abroad is protected by the due process clause of the Fifth Amendment. *E.g., Aptheker v. Secretary of State*, 378 U.S. 500, 505; *Kent v. Dulles, supra*, 357 U.S. at 129; *Shachtman v. Dulles, supra*, 225 F. 2d at 941; *Bauer v. Acheson, supra*, 106 F. Supp. at 450-451. Under appellant's argument, a wide variety of activities whose protection now rests upon other clauses of the Constitution would for the first time come under the First Amend-

ment. For example, denial of a security clearance would arguably conflict with the First Amendment because, by preventing access to classified material, it would deny citizens information useful in forming judgments on matters of public policy. The broad implications of appellant's First Amendment argument shows its fallacy—that the right to speak and publish does not carry with it the right to obtain all information that may be used for such protected purposes.

To be sure, in some circumstances limitations upon travel may raise First Amendment issues. It was argued in *Aptheker v. Secretary of State* that restrictions on travel were being used as a sanction against certain views and associations. But that contention cannot be made here. What appellant has said or written, the people with whom he has associated and the organizations he has joined, are all irrelevant. Appellant has not been required to choose between membership in an organization on the one hand and travel on the other. *Aptheker v. Secretary of State*, *supra*, 378 U.S. at 507. He and all other U.S. citizens (with a few narrow exceptions) have been denied passports valid for travel to Cuba solely because of foreign policy and national security considerations involving American relations to Cuba.

Since we believe that the First Amendment is plainly not relevant to this case, we discuss only briefly the question whether appellant's rights have been violated if it does apply. The government's position is that, at most, the restraint is indirect

and incidental. It is well established that the incidental restraint must be weighed against the governmental interest involved. *E.g., Martin v. Struthers*, 319 U.S. 141, 143. Here, as we have seen above (pp. 21-37, 68-77), the restraint on travel to Cuba is reasonably and integrally related to an important part of American foreign policy toward Latin America and to the protection of national security. Few governmental interests are of greater importance. On the other hand, appellant is restricted from traveling only to a single country which he wishes to visit because of a desire to become better informed (R. 54). In these circumstances, his personal interest is far outweighed by the governmental interests involved.

**B. THE STATUTE AUTHORIZING THE RESTRAINT ON TRAVEL TO CUBA
IS NOT UNCONSTITUTIONALLY VAGUE**

The constitutional doctrine of vagueness upon which appellant challenges the Passport Act (Br. 23-24) has no relevance to this case. As the cases cited by appellant demonstrate (Br. 24), that doctrine applies to situations in which prohibited conduct is not clearly specified. See, *e.g., Cramp v. Board of Public Instruction*, 368 U.S. 278; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495; *Winters v. New York*, 333 U.S. 507. In other words, it is intended to insure that people will know what conduct is permitted or prohibited by law. For example, in *Cramp*, where the Court struck down a Florida statute requiring State employees to swear that they had never given "aid, support, advice, counsel, or influence to the Communist Party" (368 U.S.

at 279), it pointed out that it was impossible for them to know what conduct the oath covered. Thus, employees were faced with the alternative of quitting or taking an oath, which, although they believed it to be true, might subject them to criminal sanctions.

Appellant faces no such dilemma in this case. He cannot have any doubt that if he travels to Cuba without a passport validated for that country he will violate 8 U.S.C. 1185 and be subject to prosecution thereunder. The prohibition on travel to Cuba without a passport specifically endorsed for such travel has been published in the Federal Register (Public Notice No. 179, 26 Fed. Reg. 492) and has been announced in a Department of State Press Release (No. 24). Indeed, the prohibition on travel to Cuba is stamped plainly in the front of appellant's passport.

Q. THE PASSPORT ACT DOES NOT INVOLVE AN INVALID DELEGATION OF POWER BY CONGRESS TO THE EXECUTIVE BRANCH

Finally, appellant challenges the Passport Act on the ground that it does not provide sufficiently definite standards for the Secretary of State to follow in formulating travel controls.¹⁸ As this Court frequently has recognized, however, Congress may lawfully give the President broader discretion in handling foreign affairs than in domestic affairs. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109-110. Congressional legislation

¹⁸ To the extent that the Executive's authority to restrict travel rests upon the inherent power of the President over foreign affairs (see pp. 38-41 *supra*), this contention is of course inapplicable.

"within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320. Indeed, it would be almost impossible for Congress to attempt to specify in advance the factors that the Executive is to consider in making the delicate determination whether, in what circumstances and to what countries, foreign travel should be restricted. Congress thus wisely left it to the Secretary of State to be guided by broad considerations of foreign policy in deciding whether to permit travel to particular areas, and it was on the basis of those considerations that the Secretary determined to impose a general ban on travel to Cuba.

While the Passport Act itself does not provide any specific standards for the Secretary, the statute that makes it a crime to leave or enter the country without a valid passport (8 U.S.C. 1185), does provide standards for its applicability. That Section becomes operative only after the President has proclaimed a national emergency, and then only when "the President shall find that the interests of the United States require that restrictions and prohibitions * * * be imposed upon the departure of persons from and their entry into the United States * * *." The interest of the United States has been held to be a clear enough standard in another context. *American Sumatra T. Corp. v. Securities and Exchange Commission*, 110 F. 2d 117, 121 (C.A. D.C.). It is even more clearly appro-

pritate here," where problems of foreign relations are involved.

¹⁹ Appellant argues (Br. 55-56) that the district court improperly dismissed the action as to the Attorney General. However, the Attorney General was a defendant only because petitioner sought an injunction against criminal enforcement of 8 U.S.C. 1185(c), which makes it a crime to violate statutory and administrative rules relating to passports. This Court has long upheld the rule that equity will not ordinarily enjoin a criminal prosecution. *E.g.*, *In re Sawyer*, 124 U.S. 200, 210-211; *Douglas v. City of Jeannette*, 319 U.S. 157, 163-164; *Terrace v. Thompson*, 263 U.S. 197, 214; see Hart and Wechsler, *The Federal Courts and the Federal System*, 862-864. The federal courts have repeatedly applied this rule to refuse to enjoin federal officials from prosecuting violations of federal statutes. *E.g.*, *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan v. Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills v. Camp*, 74 F. 2d 200 (C.A. 5); *Sparks v. Melwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City v. Milligan*, 90 F. 2d 855 (C.A. 8). The only exceptions to this traditional rule of equity are where the prosecution will subject the complainant to irreparable injury. *E.g.*, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98-100; *Watson v. Buck*, 313 U.S. 387, 400-401; *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95-96.

Here, the appellant has not been charged with violating any criminal statute and has apparently not violated any. He is challenging in this litigation the validity of the Department of State's administrative action on statutory and constitutional grounds. If he is successful, he will be able to travel to Cuba without fear of prosecution. Since this civil suit provides a full remedy, the appellant plainly is not faced with irreparable injury unless he can bring an action to enjoin the criminal statute.

For similar reasons, this issue is of no real importance in this case. If the appellant is successful in his suit against the Secretary of State, he is entitled to travel abroad and no prosecution can be brought by the Attorney General. On the other hand, if the appellant does not prevail against the Secretary of State, he is equally not entitled to an injunction against the Attorney General since the criminal statute merely enforces the Secretary's administrative determinations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the cause should be remanded to the district court to allow appellant to appeal to the court of appeals or, alternatively, the judgment of the district court should be affirmed.

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JANUARY 1965.

APPENDIX

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS

The Act of July 3, 1926, § 1, 44 Stat. 887, 22 U.S.C. 211a, provides, in pertinent part, as follows:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, provides, in pertinent part, as follows:

TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY— RESTRICTIONS AND PROHIBITIONS ON ALIENS

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this

section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

Section 156 of 5 U.S.C. provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the

department, and he shall conduct the business of the department in such manner as the President shall direct. *

Executive Order No. 7856 of 1938, March 31, 1938, 3 Fed. Reg. 681, 22 C.F.R. 51.75-51.77, reads, in pertinent part, as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, provides, in pertinent part, as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshiping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control of Persons Leaving or

Entering the United States By the President of the United States," provides, in pertinent part, as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and pub-

liely proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney

General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * * * *

Section 53.1-53.8 of 22 C.F.R. provide, in pertinent part, as follows:

“Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency

AMERICAN CITIZENS AND NATIONALS

§ 53.1 *Definition of the term "United States"*. The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel*. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2*. No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also*, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided*, That the person is in posses-

sion of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is \$25.

§ 53.5 *Prevention of departure from or entry into the United States.* * * *

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

§ 53.8 *Discretionary exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Public Notice 179, 26 Fed. Reg. 492, promulgated on January 16, 1961, provides:

"DEPARTMENT OF STATE
[Public Notice 179]
United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration."

Press Release No. 24, issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE NO. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being

declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

Office-Supreme Court, U.S.

FILED

JAN 27 1965

JOHN E. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

**DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General,**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

APPELLANT'S REPLY BRIEF

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INDEX

	PAGE
I. The case was properly heard by a statutory court	1
II. The President does not have inherent power to prohibit travel to particular areas	5
III. There is no statutory authority	10
A. The Passport Act of 1926	10
B. Section 215(b) of the Immigration and Nationality Act	11
IV. The restrictions upon travel are unconstitutional	15
A. Appellees' Rule of Reason	16
B. The Test Applicable to Impairments of Personal Liberty	17

Citations

CASES:

Aptheker v. Secretary of State, 378 U. S. 500	2, 5, 6, 16, 17
Bauer v. Acheson, 106 F. Supp. 445 (D. D. C., 1952)	3
Blackmer v. United States, 284 U. S. 421	9
Bransford, Ex parte, 310 U. S. 354	3, 4
Briehl v. Dulles, 248 F. 2d 561, reversed <i>sub. nom.</i>	
Kent v. Dulles, 357 U. S. 116	5, 7
Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103	7
Collins, Ex parte, 277 U. S. 565	4
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	4
Fleming v. Rhodes, 331 U. S. 100	2

CASES (Cont'd):

Hall v. St. Helena Parish Bd., 197 F. Supp. 649 (E. D. La., 1961), affirmed <i>per curiam</i> , 368 U. S. 515	2
Holmes v. Jennison, 14 Pet. (39 U. S.) 540	7
Kennedy v. Mendoza-Martinez, 372 U. S. 144	4
Kent v. Dulles, 357 U. S. 116	2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18
Marbury v. Madison, 1 Cranch (5 U. S.) 137	8
Martin v. City of Struthers, 319 U. S. 141	18
Memphis Natural Gas Co. v. Beeler, 315 U. S. 649	18
Morrill v. Jones, 106 U. S. 466	7
New York Times v. Sullivan, 376 U. S. 254	18
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290	3
Phillips v. United States, 312 U. S. 246	3, 4
Pocket Veto case, 279 U. S. 655	13
Schenck v. United States, 249 U. S. 47	18
Schneider v. Rusk, 372 U. S. 224	4
United States v. Belmont, 301 U. S. 324	8
United States v. Curtiss-Wright Corp., 299 U. S. 304	7
United States v. Eaton, 144 U. S. 677	7
United States v. Healy, 376 U. S. 75	14
United States v. Midwest Oil Co., 236 U. S. 459 ...	13
United States v. Pink, 315 U. S. 203	8
William Jameson & Co. v. Morgenthau, 307 U. S. 171	2
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579	5, 6, 7, 9

CONSTITUTION AND STATUTES:**United States Constitution:**

First Amendment	15, 17
-----------------------	--------

Statutes:

Act of February 4, 1815, Sec. 10, 3 Stat. 195	11
--	----

Act of August 18, 1856, Sec. 23, 11 Stat. 52	11
---	----

Act of March 4, 1912, c. 160, 37 Stat. 1013	3
--	---

Act of August 24, 1937, 50 Stat. 751	2
--	---

Immigration and Nationality Act of 1952, Sec. 215(b), 66 Stat. 190, 8 U. S. C. 1185	14
---	----

Neutrality Act of 1939, P. Res. 54, 76th Cong. Sec. 3, Sess., 54 Stat. 4, 7	11
---	----

Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a	10, 13
--	--------

P. Res. 67, 49 Stat. 1081	11
---------------------------------	----

28 U. S. C. 1257(2)	4
---------------------------	---

28 U. S. C. 2281	3
------------------------	---

28 U. S. C. 2282	1, 4
------------------------	------

EXECUTIVE ORDERS, PROCLAMATIONS, AND REGULATIONS:

Exec. Order 2519-A, reprinted in For. Rel. 1917, Supp. 1, 573	12
---	----

CONGRESSIONAL MATERIALS:

<i>Department of State Passport Policies</i> , Hearings before the Senate Committee on Foreign Relations, 85th Cong. 1st Sess.	13
---	----

<i>The Right to Travel</i> , Hearings before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess. pursuant to S. Res. 49, as extended by S. Res. 234, 85th Cong. 2d Sess.	13
--	----

MISCELLANEOUS:

Currie, <i>The Three Judge District Court in Constitutional Litigation</i> , 32 U. Chi. L. Rev. 1	2, 3
For. Rel. 1915, Supp., 899, 905-906	12
Hackworth, <i>Digest of International Law</i> (1942):	
Vol. 2	16
Vol. 3	12
2 Hyde, <i>International Law Chiefly as Interpreted and Applied by the United States</i> (1922)	16
3 Moore, <i>Digest of International Law</i> (1906)	12
The Federalist, No. 75	7

IN ~~CHIEF~~
Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

**DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

APPELLANT'S REPLY BRIEF

I

The Case Was Properly Heard by a Statutory Court.

Appellees urge that 28 U. S. C. 2282 is inapplicable because appellant seeks to enjoin the operation of the statute only as applied to Cuban travel (Br. 16).¹ Here appellees are in error on both the facts and the law.

First, appellant has done more than challenge the application of the statute to geographical limitations. The complaint alleges that the statutes are unconstitutional because "they contain no standards and are therefore an invalid delegation of legislative power" (R. 4); the relief sought includes "enjoining the defendants from carrying out or

¹ "Br." refers to appellees' brief; "App. Br." to appellant's original brief; "R." to the record.

enforcing the said statutes" (R. 5). If appellant's position is sustained, the statute is void upon its face.

Appellees' characterization of the delegation point as "frivolous" (Br. 18, n. 2) cannot be seriously urged in view of the weight given to this very argument by the Court in *Kent v. Dulles*, 357 U. S. 116, 129, and by Circuit Judge Smith's opinion below that the statute as construed "poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice" (R. 52). This, of course, distinguishes the case from that of *William Jameson & Co. v. Morgenthau*, 307 U. S. 171, where the attack upon the statute's constitutionality was held to be insubstantial.²

Second, a statutory court would be required here even if the complaint had not attacked the statute upon its face but only "as applied" to geographic limitations. The Court has never held that a suit cannot be brought under Section 2282 if the statute might also be applied constitutionally. No Justice of the Court questioned the necessity of a statutory court in *Aptheker v. Secretary of State*, 378 U. S. 500, although the dissenting opinion urged that the statute was constitutional at least as applied to the appellants in that case.

Appellees' argument that only "mandatory" and not "permissive" legislation requires a statutory court is not consistent with the language of the statute, the decisions of this Court or the salutary purpose of the statute.³ Neither

² See also *Currie, The Three Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 54, agreeing that the charge of "invalid delegation" in the instant case required a three-judge court.

³ See also *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649, 658 (E. D. La. 1961), aff'd per curiam, 368 U. S. 515; *Currie, op. cit. passim*. See also *Fleming v. Rhodes*, 331 U. S. 100, 102-104, upholding an appeal under the Act of August 24, 1937, 50 Stat. 751.

3

Phillips v. United States, 312 U. S. 246, nor *Ex parte Bransford*, 310 U. S. 354, supports this "mandatory-permissive" dichotomy of appellees since the complaint in neither of those cases even mentioned the authorizing statute.⁴ This is plain from the opinions of the Court in those cases. Indeed in the latter case the Court explicitly distinguished "between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional". *Ex parte Bransford*, 310 U. S. 354, 361.

Appellees rely, for purposes of contrast, upon 28 U. S. C. 2281, as amended in 1913,⁵ to include suits to restrain the enforcement of state administrative boards or commissions (Br. 15). But that amendment was intended to deal with a very different problem which concerned Congress, unconstitutional rate regulation under a statute not challenged as unconstitutional. *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292; Currie, *op cit.*, *supra*, p. 50.

Appellees seem to be arguing that because statutory courts have not usually been sought in passport cases, one is inappropriate here (Br. 21). This argument overlooks the fact that in those cases, *Kent v. Dulles*, *supra*, particularly, the plaintiff did not seek to enjoin the operation of the statutes as unconstitutional. Where such an injunction was sought, a statutory court properly sat although it ultimately held that the statute, not the Secretary's action, was constitutional. *Bauer v. Acheson*, 106 F. Supp. 445 (D. D. C.).

⁴ See Mr. Justice Frankfurter in *Phillips*, 312 U. S. 252, and Mr. Justice Reed in *Bransford*, 310 U. S. at 361. For a thoughtful criticism of these cases, see Currie, *op. cit.*, pp. 37-50.

⁵ Act of March 4, 1913, c. 160, 37 Stat. 1013.

Our view finds analogical support in the Court's decisions under 28 U. S. C. 1257(2) under which appeals may be taken to this Court as of right from state court judgments "where is drawn in question the validity of a statute of any state" on constitutional grounds. The Court has held that this includes cases where the administrative agency exercises discretion under a broad statute whose constitutionality upon its face is not subject to challenge. See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 288-290.

The instant case is one peculiarly calling for consideration by a statutory court to achieve the salutary purposes of 28 U. S. C. 2282. It involves a substantial constitutional right for which protection is sought against the enforcement of a statute challenged as unconstitutional both on its face and as applied. It meets every criterion which this Court has held relevant under 28 U. S. C. 2282: (1) the direct challenge in the complaint of the statute both as written and as applied,⁶ (2) the substantiality of the constitutional attack,⁷ (3) the prayer for injunctive relief,⁸ and (4) the effect of an injunction upon an entire regulatory system.⁹ Under these circumstances, the court below was clearly correct in holding that it had jurisdiction as a statutory court.

⁶ *Ex parte Bransford*, *supra*; see *Memphis Natural Gas Co., v. Beeler*, 315 U. S. 649, 650-51.

⁷ *Schneider v. Rusk*, 372 U. S. 224.

⁸ *Cf. Kennedy v. Mendoza-Martinez*, 372 U. S. 144.

⁹ This is not the case of "a single unique experience", *Phillips v. United States*, *supra*, at 253, but one of "unusual gravity", *Ex parte Collins*, 277 U. S. 565, 569 (Brandeis, J.).

The President Does Not Have Inherent Power to Prohibit Travel to Particular Areas.

Appellees' discussion on the merits is an essay in abstraction¹⁰ because it ignores the nature and importance of the liberty involved—the right to travel which the Court has upheld in *Kent v. Dulles*, *supra*, and *Aptheker v. Secretary of State*, 378 U. S. 500, upon constitutional grounds, against both administrative and legislative action. Appellees, in contrast, have placed this particular liberty to travel on a rung of the constitutional ladder sufficiently low that it might be impaired by the Secretary without statutory authority because of its possible effect upon foreign relations (Br. 41). But in both *Kent* and *Aptheker*, the Court treated the right to travel not merely as a liberty of movement but as one with profound implications for the exercise of First Amendment rights and of the duties of citizenship in a democracy, *Kent v. Dulles*, 357 U. S. 116, 126-127; *Aptheker v. Secretary of State*, 378 U. S. 500.

Appellees' claim of inherent power, which was not adopted by the court below, is directly contrary to the Court's decision in *Kent* where it held that the right to travel was not subject constitutionally to impairment by the Secretary, 357 U. S. 116.¹¹ This doctrine was underlined by the Court's discussion in that case, 357 U. S. 128-129, of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S.

¹⁰ This is compounded by appellees' "symbiotic" approach (Br. 43) which avoids a close analysis of the claims of inherent executive power and of statutory authority by merging the two problems.

¹¹ In the Court of Appeals, Judge Bazelon, dissenting, had stated earlier: "The broad power to curtail the movement of citizens of the United States to the extent that our Government possesses it, is vested in Congress, not in the President." *Briehl v. Dulles*, 248 F. 2d 561, 569, *revs'd sub. nom. Kent v. Dulles*, *supra*.

579, on the issue of law-making power.¹² It is a most superficial reading of *Kent* (Br. 54) which would make only liberty of exit, not liberty of travel, free from executive interference.¹³

Appellees are equally incorrect in arguing that the Court made congressional action a prerequisite to restrictions upon movement only where the restrictions were based upon political associations (Br. 53). This Court's discussion of the need for "joint action by the Chief Executive and the Congress", 357 U. S. 116, 128, was made with reference to the "constitutional right of the citizen" to travel, not the right to equality of treatment for persons of different political views.

The constitutional principle against executive law-making is not a sport in constitutional law limited to liberty of movement. No right, whether of personal liberty or of property, can constitutionally be impaired by executive action even where the claim is one of war emergency, *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. In that case, involving, unlike here, a very real problem affecting national defense during the Korean War, this Court stated:

" * * * In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks

¹² In *Aptheker v. Secretary of State*, 378 U. S. 500, 518, Mr. Justice Black stated: "Without reference to other constitutional provisions, Congress, has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations."

¹³ See the references in that opinion to the right of "travel", 357 U. S. at 129, "the free movement of citizens", *id.* at 130, "freedom of movement", *id.* at 126 and "[f]reedom of travel", *id.* at 127; and in *Aptheker* to "the right to travel abroad", 378 U. S. at 505, 507-508.

wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." 343 U. S. 579, 587.

See also *United States v. Eaton*, 144 U. S. 677, 688; *Morrill v. Jones*, 106 U. S. 466, 467.

"Foreign policy" no more constitutionally justifies disregard of the separation of powers doctrine than did the far more critical war power relied upon in *Youngstown*. When Chief Justice Taney said that "[a]ll the powers which relate to our foreign intercourse are confided to the general government"; *Holmes v. Jennison*, 14 Pet. (39 U. S.) 540, 570, he was not discussing an inherent executive power to dispose of liberty and property.¹⁴ The Court's reference to the President's power over foreign affairs as "exclusive" and independent of "an act of Congress", *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320, must be read in context. The issue there was not whether the President had inherent power, but whether the standards under a statute unequivocally authorizing an arms embargo were a sufficient basis for his action.

Nor does *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, uphold appellees' thesis of an inherent executive power to dispose of liberty or property because foreign relations are involved. In that case, the Court held that Executive action authorized by Congress with respect to foreign air route licenses was not reviewable judicially because of foreign policy considerations.¹⁵

¹⁴ Judge Bazelon's recital of foreign relations cases did not suggest that the President had inherent power in all such cases; many of them were examples of congressional authorization, *Briehl v. Dulles*, 248 F. 2d 561, 566-568, reversed *sub nom. Kent v. Dulles*, 357 U. S. 116. The original proposal to give the foreign relations power exclusively to the Executive was rejected, *The Federalist*, No. 75.

¹⁵ The distinction is noted by Mr. Justice Jackson concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635-636, n. 2. Further, one presumably has no greater property right in an air route than he has a right to demand a government contract.

The President does have inherent power over foreign affairs in such matters as recognition of foreign governments, negotiating treaties and receiving ambassadors, which are explicitly delegated to him by the Constitution.¹⁶ But he does not possess plenary power over the liberties or properties of American citizens or residents, and no cases in this Court have so held. Only an indifferent reading of the Litvinov Assignment cases, *United States v. Pink*, 315 U. S. 203, and *United States v. Belmont*, 301 U. S. 324, could have led appellees to a contrary conclusion (Br. 39-41). In *Belmont*, the Court took pains to describe the defendant as a mere custodian of funds in which it had no interest;¹⁷ in *Pink*, the Court noted that the local creditors had been paid and it held that a government had a right to reallocate assets as against foreign creditors. 315 U. S. 203, 226-227.

The claim of inherent executive power is not enhanced by the assertion that "suspension of travel to a foreign country is a recognized instrument of foreign policy" (Br. 40).¹⁸ If this were true, it might well be urged in the arenas of diplomacy or international law; it is not responsive to the American citizen's constitutional objection to executive lawmaking. Appellees seek circuitously to establish their foreign affairs argument by describing the passport as a diplomatic document (Br. 40); their earlier at-

¹⁶ It is to such matters that the Senate Foreign Relations Committee and Congressman (later Chief Justice) Marshall referred in the statements relied upon by appellees (Br. 38). In *Marbury v. Madison*, 1 Cranch 137, 166 (1803), Chief Justice Marshall, in discussing executive powers beyond judicial control, said, "[t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."

¹⁷ 301 U. S. 324, 332.

¹⁸ The texts cited are most general in their observations and their emphasis is on trade regulation which itself requires legislative action (App. Br. 42):

tempt in *Kent*¹⁹ was rejected by the Court, 357 U. S. at 129. It is strange to be told now that "the discriminatory interdiction voided in *Kent* had little, if any, relation to foreign policy" (Br. 12) in view of the Government's argument in that case.²⁰

The claim of inherent power is the assertion of the royal prerogative in modern dress. But the *writ ne exeat* as a restriction upon the travel of citizens is essentially outmoded; its vestigial remains, if any, were bequeathed to the Congress, not to the President, upon the adoption of the Constitution. *Blackmer v. United States*, 284 U. S. 421, 437-438.

Since the Constitution does not give the Executive the power to prohibit travel to particular areas, the arrogation of that power by the Secretary could not accomplish that result. The opinions of Justices Frankfurter and Clark in *Youngstown, supra*, at pp. 610, 635, indicate that even substantial precedents of executive action²¹ cannot breach the doctrine of separation of powers; *a fortiori*, the few instances of announced passport restrictions, under ambiguous circumstances, often in wartime and usually without sanctions, cannot establish the existence of inherent power in the President to prohibit travel. We discuss the Secretary's practices more fully below in meeting the argument that these administrative practices have still another function, the establishment of congressional intent in the passage of legislation.

¹⁹ Brief of the Solicitor General in *Kent v. Dulles*, Oct. Term 1957, No. 481, pp. 18, 19.

²⁰ Brief of the Solicitor General in *Kent v. Dulles*, Oct. Term 1957, No. 481, pp. 18-19, 93.

²¹ Mr. Justice Frankfurter pointed to precedents "over a period of 80 years and in 252 instances", 343 U. S. 579, 611.

III

There Is No Statutory Authority.

As previously indicated, *supra*, p. 5, it is not always easy to distinguish between appellees' arguments on the two separate issues of inherent executive power and of statutory authority. Statutes are treated as establishing inherent power and the latter in turn is used to explain the statutes. Having treated the inherent power issue separately, we now turn to the issue of statutory power.

A. The Passport Act of 1926

Appellees begin by describing the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, as conferring on its face an "unequivocally discretionary" power (Br. 42) which "must include the power to determine the countries for which passports will be issued," *ibid*.

This description flatly ignores the Court's recognition in *Kent* of the limited purpose of that statute and its two predecessors, 357 U. S. at 127. It is not permissible to rewrite a statute by embellishing its plain language, disregarding the reasons for its passage, and radically changing its purpose in order to avoid a "niggardly construction" in the area of "foreign affairs" (Br. 43). As *Kent* holds, the Secretary's interference with the travel of United States citizens is a matter of domestic law, 357 U. S. at 123, and the established canons of interpretation in matters affecting liberty require a narrow construction of this particular statute, 357 U. S. at 129-130. Thus read, the statute remains what this Court thought it was in *Kent*, an act to prevent the fraudulent issuance of passports by authorizing their issuance only by the Secretary of State.

Significantly, appellees nowhere state flatly that the statute was intended to grant power to impose area restrictions. Instead, we are told in most elusive language

that the statute should be read as "*confirming and regularizing*" the "broad authority . . . over passports" so that the statute is, in a "*substantial sense*, an independent source of the authority to limit the areas for which passports shall be issued" (Br. 42-43, *italics added*). Appellees' hesitancy is underscored by their emphasis that it "is unnecessary to pitch the case upon either source of authority alone" (Br. 43) because inherent executive power and statutory power "have grown together in a symbiotic relation" (*ibid.*). No judicial precedent is cited for this claim that an inadequate statute and an insufficient grant of executive power can grow by symbiosis into a constitutional exercise of power over liberty or property.

Appellees' reference to the Secretary's practices prior to the Act of 1926 might, of course, be relevant for the limited purpose of determining what Congress intended in that statute, *Kent, supra*, p. 128, although it is doubtful that they could be used to establish a meaning different from the original statute²² which employed substantially the same language. The truth is that appellees' recital of the Secretary's practices is so insubstantial and irrelevant that it cannot establish a congressional intention to authorize the imposition of area restrictions by the Secretary.

1. Appellees begin their recital of past practice with the Act of February 4, 1815, § 10, 3 Stat. 195, which prohibited travel to certain enemy areas (Br. 44). Aside from the fact that it is an example of congressional, not administrative, action it shows how Congress can and does act when it desires to impose area restrictions.²³

²² Act of August 18, 1856, Sec. 23, 11 Stat. 52.

²³ Other examples of explicit area restrictions authorized by Congress may be found in The Neutrality Act of 1939, P. Res. 54, 76th Cong. § 3, 54 Stat. 4, 7, and in P. Res. 67, 49 Stat. 1081 (Aug. 31, 1935).

2. In the Civil War example, Secretary of State Seward announced that "[i]nsurrectionary assemblages avow the fact that they are sending agents to Europe on errands hostile and injurious to the peace of the country and dangerous to the Union", 3 Moore, *Digest of International Law*, 920 (1906). This was a ban upon travel for imputedly dangerous purposes of the type disposed of by *Kent*; it was not an area restriction.

3. Appellees' other examples are discussed by the State Department's official commentator under the heading "War Regulations", 3 Hackworth, *Digest of International Law* (1942) § 272. He correctly points out that when the first restrictions were imposed, "American citizens were not required by law to carry passports", *id.* at 526. Therefore, there was no "prohibition" of travel such as is claimed here (Br. 53). Indeed, the State Department's notice of November 17, 1914, to which the appellees refer (Br. 44), merely "advised" American citizens "to avoid visiting unnecessarily countries which are at war", 1915 For. Rel. Supp. 905-906; Hackworth, *op. cit.* at 526²⁴

4. Executive Order No. 2519-A²⁵ (Br. 44) is completely inapposite. It was promulgated at a time when a passport was not required for travel. It was silent on the subject of area restrictions. The authority which it gave the Secretary to refuse passports in his discretion was the very authorization embodied in a later executive order which was stricken in *Kent*.

5. Finally, appellees note that "[n]o passports were issued for travel in Germany and Austria until July 18, 1922, and none for Russia until September, 1923" (Br. 45). There is no indication that such travel was actually prohibited.

²⁴ On similar attempts to "dissuade" travel, see 1915 For. Rel. Supp. 899.

²⁵ Reprinted in For. Rel., 1917, Supp. 1, p. 573.

This recital of events antedating the Passport Act of 1926 is a most insubstantial basis for imputing to Congress an intention to give the Secretary plenary power over the travel of American citizens under a statute which does not say so.

The congressional intent is even less susceptible of proof by viewing the Secretary's conduct subsequent to the passage of the statute. Official behavior, no matter how self-seeking, can never establish in an administrative agency power over liberty or property beyond that of the language of the congressional enactment.²⁶ It was for that reason that this Court's interpretation in *Kent* of the Passport Act of 1926 was based upon the Secretary's practices antedating that statute and that the Court disregarded the very substantial denial of passports for political reasons, upon which he relied after that date.²⁷ We note, however, that all but the most recent ones involved denial of passports and not denial of the right to travel, that the Department of State was by no means clear that travel was "prohibited" in more than a hortatory sense,²⁸ and that there were no

²⁶ Appellees' citations are not in point (Br. 50). The *Pocket Veto* case, 279 U. S. 655, involved a unique problem of relations between the President and Congress. *United States v. Midwest Oil Co.*, 236 U. S. 459 did not interfere with the property or liberty of the citizens, *id.* at 475.

²⁷ See the dissenting opinion of Mr. Justice Clark in *Kent v. Dulles*, 357 U. S. at 130, 135, 139, 141; Brief of the Solicitor General, in *Kent*, pp. 60-72; *The Right to Travel*, Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong. 1st Sess. pursuant to S. Res. 49, as extended by S. Res. 234, 85th Cong. 2d Sess., *passim*.

²⁸ The State Department has advised Congress: "It means that if the bearer enters country X he cannot be assured of the protection of the United States. For this reason, and frequently for other reasons, it means that the United States does not approve of the bearer's going to country X. The restriction on the passport does not necessarily mean that if the bearer travels to country X he will be violating the criminal law . . .". *Department of State Passport Policies*, Hearings before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., p. 59.

criminal prosecutions until 1963 when American college students visited Cuba.

B. Section 215(b) of the Immigration and Nationality Act

Appellees make no claim that the language of Section 215(b) authorizes the imposition of area restrictions. They do not challenge our statement of its purposes (App. Br. 30, *et seq.*), and they recite no legislative history to meet the detailed proof set forth in our original brief (App. Br. 31-37).

Nor do appellees argue that the Secretary relied upon Section 215(b) as the basis for the area restrictions. Instead, they say that the statute "confirms the authority of the Secretary to impose area restrictions",²⁹ that Congress "must have been aware"³⁰ of the Secretary's passport restrictions and that "the new provision was not intended to curtail the existing discretion of the Executive".³¹

The basic difficulty with appellees' argument is that, in defiance of both congressional language and objectives, it would turn an American border control statute into one prohibiting travel to particular foreign areas, and a national defense statute operating in wartime into a foreign affairs statute operating in peacetime. The argument that the "greater power", i.e., to forbid passports entirely, "neces-

²⁹ Br. 56.

³⁰ *Ibid.* Since the "Secretary's past restrictions" were never based upon Section 215(b) or its predecessor statutes, the Court did not regard them in *Kent* as relevant to the interpretation of that section, and the same result would follow here. *United States v. Healy*, 376 U. S. 75 (Br. 61) cited by appellees did not involve the construction or application of Section 215(b).

³¹ Br. 57.

sarily includes the lesser power" (Br. 61) assumes that the same kind of power is under discussion. But in 1952 (as in 1918 and 1941) Congress authorized the President to prevent particular aliens and citizens from entering or departing from the United States if there were reason to believe that they were involved in espionage or similar activities injurious to the prosecution of war (App. Br. 31, 35, 37). Congress expressed no interest at all in the foreign countries from which travellers came or to which they wished to go. It certainly did not authorize area restrictions in general aid of our foreign policy.

Appellees urge that the failure of Congress to enact legislation which would authorize area restrictions may be disregarded because Congress may have considered them "superfluous" and the bills dealt with a "wide range of problems" (Br. 51, n. 10). Actually, most of the bills were concerned with only two problems: area restrictions and Communist travel. There is no basis for believing that legislation so consistently and vigorously urged in two branches of the Government was regarded as "superfluous". There is no recorded instance of opposition to the legislation on this ground.

IV

The Restrictions Upon Travel Are Unconstitutional.

We believe that this case should be treated precisely as the Court did in *Kent*: (1) There is no inherent executive power to limit the travel of American citizens; and (2) explicit legislative authority which is required to restrict a liberty is lacking here. In any event, the restrictions should be stricken because they not only fail to meet the rigorous constitutional test suggested in *Kent* for First Amendment situations, but they fail even to meet the lesser test of "reasonableness" proposed by appellees.

A. Appellees' Rule of Reason

1. Appellees' first argument in support of the constitutionality of the travel ban is that it prevents "persons from going to Cuba for training in subversion and then returning to Latin America to perform what they have been taught" (Br. 36). While essentially conceding the harmlessness of travel of United States citizens, appellees urge that we must furnish a good example to the Latin American nations if they are to obstruct the travel of their own citizens.

We submit that it is irrational to deprive United States citizens of the right to travel to Cuba because, it is claimed, some nationals of other countries may engage in "subversion." In *Kent* and *Aptheker*, the right to travel, even of persons beyond the pale politically, was protected; here, our Government would ban the travel of law-abiding United States citizens because the travel of some Latin Americans may be harmful to their countries. This is another kind of wide-net which *Aptheker* held to be improper. There are surely means of protecting Latin American nations against their own "dangerous citizens" other than by depriving our citizens of their rights.

2. Appellees next urge that "the indiscriminate travel of American citizens to Cuba could easily lead to incidents which might embroil the United States in international conflict" (Br. 36). This is pure speculation; indeed, appellees refer only to "events [which] occurred before the present Cuban government came to power, and in its early days" (Br. 36).

The "international embarrassment" of having American citizens mistreated (Br. 37) is equally imaginary. No one has ever questioned the Government's ability to protect its citizens abroad. Such "embarrassment" is easily avoided by the familiar warning to citizens that they may lose governmental protection.³³ If despite all this

³³ See e.g. 2 Hyde, *International Law* 1178-1179 (1922); 2 Hackworth, *Digest of International Law* 285 (1942).

the Government is "embarrassed," that is of little weight compared to the deprivation of liberty involved in this case and the light in which it correctly places our country in world opinion.

3. Appellees' third reason is that the United States desires to isolate Cuba from the outside world. The impressive list of economic sanctions against Cuba (supported by legislation in each case except travel) does not raise the serious constitutional problems involved in the infringement of personal liberty. On appellees' theory, it would be entitled to prohibit the travel of American citizens to France upon each occasion of disagreement with President De Gaulle. The desire to isolate another country may justify a breach in diplomatic relations, even a trade embargo. But under no rule of reason can it constitutionally justify the deprivation of the liberty of United States citizens.

B. The Test Applicable to Impairments of Personal Liberty

Liberty of movement was upheld in *Kent* and *Aptheker* not because of the intrinsic value of mobility but because of the uses, protected by the First Amendment, to which that liberty should be put. We need only refer the Court to its discussion in both *Kent* and *Aptheker* of the need of our citizens to visit other countries and to meet their nationals in order better to equip themselves as American citizens.³⁴ As Mr. Justice Douglas stated, concurring in *Aptheker*:

"This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all

³⁴ *Kent v. Dulles*, 357 U. S. at 126-127; *Aptheker v. Secretary of State*, 378 U. S. at 505-506.

other rights suffer, just as when curfew or home detention is placed on a person." 378 U. S. at 520.

Liberty to travel is a liberty to learn, to read, to see for oneself instead of relying upon official statements or the frequently weighted expressions of the commercial press. The right to criticize public officials, *New York Times v. Sullivan*, 376 U. S. 254, is meaningless without the right to obtain relevant information.³⁵ Appellees' analogy of classified information is a forced one. That would require the Government to take affirmative action to disclose its own papers, often relating to national defense. But the instant case involves the citizen's request only that his search for truth outside official files and press releases be free from governmental obstruction.

The nature of the liberty here involved is such that its impairment, even by Congress, could only occur where there was a showing of the gravest imminent danger to the public safety. See *Kent v. Dulles*, 357 U. S. at 128. Cf. *Schenck v. United States*, 249 U. S. 47, 52. Since appellees concede, by the standards proposed by them (Br. 41), that they cannot meet this test, the restrictions upon the travel of appellant and all other American citizens are unconstitutional.

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³⁵ See *Martin v. City of Struthers*, 319 U. S. 141, 143, 146.